Supreme Court, U.S.
FILED
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CLERK

SUPREME COURT OF THE UNITED STATES

NEW ORLEANS BAPTIST
THEOLOGICAL SEMINARY,
Petitioner

VERSUS NO. 89-1997

RUDOLPH G. BABCOCK,
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for Rudolph G.
Babcock, Respondent

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VERSUS NO. 89-1997

RUDOLPH G. BABCOCK,
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF THE
COURT OF THE UNITED STATES:

Rudolph G. Babcock, Respondent, submits that this Court should not grant New Orleans Baptist Theological Seminary's ("NOBTS" or "School") Petition for Writ of Certiorari for the following reasons:

First, the School's Petition does not satisfy the standards of Supreme Court Rule 10. That is, the decision of the Fourth Circuit Court of Appeals for the State of Louisiana does not conflict with any other state or federal decision, and does not raise an important issue of federal law.

Second, and related to the first, the dispute herein is a simple one that has been blown way out of proportion by the School. That NOBTS has tried to make a mountain out of a mole hill is evinced by the following indisputable facts:

(A) NOBTS sought accreditation from the Southern Association of Colleges & Schools (SACS);

(B) SACS required NOBTS to include a due process statement;

(C) Pursuant thereto, the School promulgated disciplinary standards including the right to discipline (expel) in the event of separation or divorce;

(D) The School allegedly expelled Babcock because he was separated or divorced without adherence to the procedural requirements;

(E) Babcock neither was nor is separated or divorced;

(F) The School, accordingly, entered into a consent judgment (injunction) resulting in the reinstatement of Babcock;

(G) Babcock then indisputably and satisfactorily completed his studies over the next two years;

(H) The School, nevertheless, refused to award Babcock his degree, claiming that Babcock was not fit for his degree based upon the same conduct that was the subject of the consent injunction that prohibited the School from dismissing Babcock from School; and

(I) The School never appealed the consent injunction which it, in fact, drafted.

For reasons more fully set forth in the decision of the Fourth Circuit itself (Petitioner's Exhibit A-1), as well as the Briefs submitted by Respondent to the Louisiana Fourth Circuit

Court of Appeals (see Appendix at A-3 and A-4), this Court should deny the School's Petition for a Writ.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response has been served upon:

James P. Guenther
Guenther & Jordan
860 Vanderbilt Plaza
2100 West End Avenue
Nashville, Tennessee 37203
(615) 329-2100
Attorneys for Petitioner

by hand or by placing copies of same in U. S. Mail, postage prepaid and properly addressed this 19th day of July, 1990.

Ellis B. Murov

ELLIS B. MUROV

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 87-15087 DIVISION "B" DOCKET NO.

RUDOLPH G. BABCOCK

VERSUS

NEW ORLEANS BAPTIST
THEOLOGICAL SEMINARY

FILED: _____ _____
DEPUTY CLERK

PETITION FOR SPECIFIC
PERFORMANCE AND INJUNCTIVE RELIEF

Petitioner, Rudolph G. Babcock, through undersigned counsel, with respect represents.

PARTIES

1.

Rudolph G. Babcock is an individual of the full age of majority residing and domiciled in Orleans Parish with his wife, Suzanne Babcock.

2.

Defendant, New Orleans Baptist Theological Seminary ("School"), is an educational institution located in Orleans Parish.

BACKGROUND

3.

Suzanne and "Rudy" Babcock were married in December 1983. They have never separated and are still married and living together as husband and wife.

EXHIBIT
A-1

4.

In August 1985, Plaintiff entered the School to pursue a Masters of Divinity degree in marriage and family counseling.

5.

The terms and conditions of Plaintiff's educational tenure are set forth in a student handbook. The School has a divorce policy calling for withdrawal in the event of "separation and/or divorce." A copy of the cover page of the student handbook as well as the School's divorce policy and its "Due Process for Handling Conduct Situations" is attached hereto as Exhibit A.

6.

According to the provisions entitled "Due Process for Handling Conduct Situations," dismissal for, inter alia, separating from and/or divorcing one's spouse cannot occur until:

(a) The student has been given an initial hearing with the Executive Vice President (in this case Dr. Stewart) where he is informed "of all details of the process" and, if appropriate, provided with a written, signed complaint;

(b) If the student receives a written, signed complaint, he then has a second interview with the Executive Vice President (again, Dr. Stewart) where the alleged violation is discussed and the student is given an opportunity to submit a written counterstatement. Additionally, a written continuity report must be prepared at this stage;

(c) Assuming that the matter is not resolved in favor of the student at this level, the student is given the right to read the continuity report in its entirety before the case is submitted to a Student Affairs Committee for a hearing at which time the student has the right to be present along with a representative and any witnesses whom he desires to call. Assuming that the Student Affairs Committee confirms the disciplinary decision, the student then has the right to appeal to the President of the School.

7.

On July 29, 1987, Petitioner was made the beneficiary of a $400 grant from the Lowrey B. Eastland Memorial Fund for the fall semester of 1987 ("Grant"). A copy of a letter from Dr. Don H. Stewart, Executive Vice President, to Petitioner evincing the grant is attached hereto as Exhibit B.

8.

On August 4, 1987, Petitioner received a letter ("Exhibit C") from Dr. Don H. Stewart, Executive Vice President, stating, inter alia, the following:

(a) A meeting of the Student Affairs Committee was held on July 31, 1987;

(b) At the meeting, Petitioner was accused of having separated from his wife and considering a divorce;

(c) Petitioner could not continue in his degree program and must vacate the campus where he is living in his trailer with his wife and two children; and

(d) "The action of the Committee is final. According to institutional policy long enforced, the possibility of returning to this Seminary is virtually non-existent when termination follows probation."

9.

Plaintiff has never been on probation and has never separated from his wife.

FIRST CAUSE OF ACTION

10.

Plaintiff realleges and reavers all allegations contained in paragraphs 1 through 8 above as if repeated herein in extenso.

11.

Petitioner has been dismissed from the School in violation of the contract between Petitioner and the School. In

particular, Petitioner is not separated from his wife and has not been afforded the protections set forth in paragraph 6 above.

12.

Since specific performance is authorized by La. Civ. Code Arts. 1986 and 1987 and is in fact a favored remedy (J. Weingarten, Inc. v. Northgate Mall, 404 So. 2d 896 (La. 1981)), Petitioner is entitled to specific performance in the form of an injunction mandating the School to permit Petitioner to register on August 20 and/or 21, 1987 with full use of the Grant and campus facilities for his trailer and prohibiting the School from dismissing him on the purported grounds of separation.

SECOND CAUSE OF ACTION

13.

Petitioner realleges and reavers all allegations contained in paragraphs 1 through 12 above as if repeated herein in extenso.

14.

Registration for the fall semester will be held only on August 20 and 21 and anyone who does not register then will not be allowed take classes this fall.

15.

Petitioner is 38 years old. He is in the middle of his curriculum having entered the School in August of 1985. Plaintiff anticipates graduating in May of 1989. If Petitioner is dismissed from the School and disallowed to register, Petitioner's career goals and plans will be disrupted thereby causing him immediate and irreparable injury and loss. Plaintiff, therefore, is entitled to a temporary restraining order prohibiting the School from dismissing Plaintiff on the purported grounds of separation and requiring the School to permit Peti-

tioner to enroll on August 20 and/or 21 with the full use of the Grant and campus facilities for his trailer.

16.

Since registration for the fall semester must be completed on August 20 or 21 and since today is August 18, issuance of a temporary restraining order without any notice to the School is both appropriate and necessary.

WHEREFORE, Petitioner prays that a copy of this Petition be served upon Defendant and that:

a. A temporary restraining order be issued prohibiting the School from dismissing Petitioner of the purported grounds of separation and requiring the School to allow Plaintiff to register on August 20 and/or 21, 1987 and with the benefit of the Grant and campus facilities for his trailer.

b. After due proceedings be had, a preliminary and/or permanent injunction be issued prohibiting the school from dismissing Petitioner on the purported grounds of separation and from interfering with Petitioner's career goals and studies and

c. After due proceedings be had, all costs and attorneys' fees to be assessed against Defendant.

ELLIS B. MUROV
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Telephone: (504) 581-5141
Attorneys for Rudolph G. Babcock

PLEASE SERVE:

NEW ORLEANS BAPTIST THEOLOGICAL SEMINARY
Through its President and Executive Officer,
Dr. Landrum P. Leavell
3939 Gentilly Boulevard
New Orleans, Louisiana 70126

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 89[illegible] DIVISION "B" DOCKET NO.

RUDOLPH G. BABCOCK

VERSUS

NEW ORLEANS BAPTIST THEOLOGICAL SEMINARY

FILED: _____ _____
DEPUTY CLERK

PETITION FOR TEMPORARY RESTRAINING ORDER, INJUNCTIVE RELIEF AND SPECIFIC PERFORMANCE

Petitioner, Rudolph G. Babcock, through undersigned counsel, with respect represents:

PARTIES

1. Rudolph G. Babcock is an individual of the full age of majority residing and domiciled in Orleans Parish with his wife, Suzanne Babcock.

2. Defendant, New Orleans Baptist Theological Seminary ("School"), is an educational institution located in Orleans Parish.

BACKGROUND

3. Rudolph Babcock is a duly matriculated student at the School.

4. In August, 1985, Babcock entered the School to pursue a Master of Divinity degree in marriage and family counseling.

5. On August 4, 1987, Babcock received a letter from the School's executive vice president expelling him for having allegedly separated from his wife and for considering divorce.

6. Petitioner had not separated from his wife and he was not considering divorce. Babcock, moreover, was expelled without a hearing, in total disregard for the procedures printed in the student handbook as "due process" for student disciplinary matters.

EXHIBIT
A-2

7. As a result, on August 19, 1987, Babcock filed suit for specific performance and injunctive relief. See No. 87-15087. (Exhibit 1).

8. A temporary restraining order was granted by Judge Yada McGee prohibiting the School from dismissing Babcock and from interfering with his career goals and studies.

9. When the cause was to be heard for the issuance of a permanent injunction, the School interposed an exception of lack of jurisdiction, claiming state interference in church matters.

10. On December 21, 1987, the hearing on the exception was held.

11. On March 18, 1988, the exception was dismissed. (Exhibit 2).

12. On May 31, 1988, the parties agreed to a consent "final judgment," whereby the School, reserving its right to appeal the jurisdictional issue, agreed to a permanent injunction prohibiting Babcock's dismissal "based upon any of his conduct or activities occurring on or before August 19, 1987 . . . ." and reinstated his scholarship. (Exhibit 3).

13. The School appealed only the denial of the Exception devolutively. (Exhibit 4). The Appeal is pending. See No. 89-CA-0233 Fourth Circuit Court of Appeals. As a result, the School is barred by the doctrine of res judicata from contesting the merits of the injunction/consent final judgment.

14. Babcock has continued his studies, has completed all requirements, and has received letters, notices and verifications of the imminency of his graduation from the public relations office, the executive vice president, the director of housing, the registrar, the president, and the Southern Baptist Foreign Mission Board. (Exhibit 5 in globo).

15. On May 9, 1989, the day before Babcock's Appellee's Brief was due, counsel for Babcock received a two-line letter notifying counsel that the School refuses to award Babcock's

degree at commencement, May 20, 1989 because if he had been expelled in August of 1987, he would not have earned his degree, and be on the May 20, 1989 graduation list. (Exhibit 6 and 7).

16. Petitioner has completed satisfactorily all requirements for graduation. The withholding of a degree by the School breaches the contract which exists between a school and its students and the School and Babcock.

17. Moreover, the School, having agreed by consent judgment, approved by this Court May 31, 1988, not to dismiss Petitioner for any alleged offense which occurred on or before August 19, 1987, is in violation thereof by its refusal to allow Petitioner to graduate based on the same alleged offense.

WHEREFORE, Petitioner prays that a copy of this Petition be served upon defendant and that:

(a) A temporary restraining order be issued prohibiting the School from dismissing Petitioner by refusing to allow him to graduate May 20, 1989 and requiring the School to issue to petition the Master of Divinity degree which he has earned.

(b) After due proceedings be had, a preliminary and/or permanent injunction be issued prohibiting the School from dismissing Petitioner by refusing to allow him to graduate and requiring the School to issue to him the Master of Divinity degree which he has earned.

(c) After due proceedings be had, all costs and attorneys' fees to be assessed against Defendant as a result of forcing Babcock to bring an action to compel defendant to honor an order of this Court.

ELLIS B. MUROV (9839)
JOANNE C. FERRIOT (18209)
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New Orleans, Louisiana 70130
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ATTORNEYS FOR PLAINTIFF,
RUDOLPH G. BABCOCK

PLEASE SERVE:

NEW ORLEANS BAPTIST THEOLOGICAL SEMINARY
Through its President and Executive Officer,
Dr. Landrum P. Leavell
3939 Gentilly Boulevard
New Orleans, Louisiana 70126

ORDER

All evidence herein having been presented and the evidence being in favor of plaintiff,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

(a) A temporary restraining order be issued prohibiting the School from dismissing Petitioner by refusing to allow him to graduate May 20, 1989 and requiring the School to issue to petition the Master of Divinity degree which he has earned.

(b) After due proceedings be had, a preliminary and or permanent injunction be issued prohibiting the School from dismissing Petitioner by refusing to allow him to graduate and requiring the School to issue to him the Master of Divinity degree which he has earned.

(c) After due proceedings be had, all costs and attorneys' fees to be assessed against Defendant as a result of forcing Babcock to bring an action to compel defendant to honor an order of this Court.

_____
JUDGE

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. _____ DIVISION "B" DOCKET NO.

RUDOLPH G. BABCOCK

VERSUS

NEW ORLEANS BAPTIST THEOLOGICAL SEMINARY

FILED: _____ _____
DEPUTY CLERK

VERIFICATION

Before me, the undersigned authority, personally came and appeared:

Rudolph G. Babcock

who, after being duly sworn, did depose and states that: I have read the foregoing Petition for Temporary Restraining Order, Injunctive Relief and Specific Performance, and that all of the allegations contained therein are true and correct to the best of my knowledge.

Rudolph G. Babcock
RUDOLPH G. BABCOCK

Sworn to and subscribed
before me this 12 day
of May, 1989.

Jorge Francisco Bertran
NOTARY PUBLIC

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. _____ DIVISION "B" DOCKET NO.

RUDOLPH G. BABCOCK

VERSUS

NEW ORLEANS BAPTIST THEOLOGICAL SEMINARY

FILED: _____ _____
DEPUTY CLERK

AFFIDAVIT

Before me, the undersigned authority, personally came and appeared:

Joanne C. Ferriot

who, after being duly sworn, did depose and state: In compliance with Louisiana Code of Civil Procedure Article 3603, I have had delivered by hand the original of the attached letter to the offices of counsel for the New Orleans Baptist Theological Seminary, Mr. A. Morgan Brian.

JOANNE C. FERRIOT

Sworn to and subscribed
before me this 12 day
of May, 1989.

NOTARY PUBLIC

STATE OF LOUISIANA

COURT OF APPEAL

FOURTH CIRCUIT

COURT OF APPEAL,
FOURTH CIRCUIT
FILED MAY 10 1983
Danielle Schott
CLERK OF COURT

NO. 89-CA-0233

RUDOLPH G. BABCOCK
Plaintiff-Appellee

versus

NEW ORLEANS BAPTIST THEOLOGICAL SEMINARY
Defendant-Appellant

Appeal of Civil Proceeding
from the Civil District Court
for the Parish of Orleans
Hon. Robert A. Katz, Judge

Original Brief of Appellee

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SYLLABUS

1. Characterizations are not dispositive. E. g., Commissioner v. Culbertson, 337 U.S. 733 (1949) and cases cited at pp. 10-11.

2. NOBTS is a school based upon the facts and not the characterizations.

3. As a school, NOBTS' relations with its students are basically contractual and may thus be reviewed by the courts, especially in disciplinary matters. E. G., Fussell v. Louisiana Business College of Monroe, 478 So.2d 652 (La. App. 2d Cir. 1985); Lexington Theological Seminary v. Vance, 596 S.W.2d 11 (Ky. App. 1979), and Tedeschi v. Wagner College, 427 N.Y. Supp. 24 760 (N.Y. App. 1980) and cases cited at pp. 15-16.

4. Where a school makes assurances to other entities in exchange for valuable consideration and for the benefit of its students, it cannot refuse to honor those assurances. La. Code Civ. Art. 1967 and Lemon v. Bossier Parish School Board, 240 F.Supp. 709 (W.D. La. 1965), affd, 370 F.2d 84, cert. denied, 388 U.S. 911 (1967).

5. Contracts are secular in nature, and the interpretation of contracts does not entangle the courts in ecclesiastical matters. Jones v. Wolf, 443 U.S. 595 (1979). Fluker Community Church v. Hitchens, 419 So.2d 445 (La. 1982), LeBlanc v. Davis, 432 So.2d 239 (La. 1988).

6. Since breach of contract is not a tenet of the Baptist church, NOBTS' actions are not immune from review by the civil courts. See E.E.O.C. v. Miss. College, 626 F.2d 477 (5th Cir. 1977), Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978). Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980); Lexington Theological Seminary v. Vance, supra.

CONCISE STATEMENT OF FACTS

a) Rudolph G. Babcock ("Babcock") is an individual of the full age of majority residing and domiciled in Orleans Parish with his wife Suzanne Babcock. Plaintiff's Petition for Specific Performance and Injunctive Relief, par. 1.

b) Babcock became a licensed minister of the Baptist Church long before entering New Orleans Baptist Theological Seminary, hereinafter referred to as "NOBTS" or "the School." R-III, pp. 181-82.

c) Suzanne and "Rudy" Babcock were married in December, 1983. They have never separated and are still married and living together as husband and wife. Plaintiff's Petition for Specific Performance and Injunctive Relief, par. 3.

d) In August, 1985, plaintiff entered the School to pursue a Masters of Divinity degree in marriage and family counseling rather than to become a minister.[1/] Plaintiff's Petition for Specific Performance and Injunctive Relief, par. 4; R-III, p. 189.

e) The terms and conditions of plaintiff's educational tenure are set forth in a student handbook and in the

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1/ Babcock's matriculation into the School's Division of Pastoral Ministries was required by the fact that the School had promised a Master of Arts program in that field, Babcock had begun his studies with that goal in mind, and then the School withdrew the program. The courses required for the degree are currently lodged within the Division of Pastoral Ministries. (R-III, p. 209).

School bulletin. The School has a divorce policy calling for withdrawal in the event of the "separation and/or divorce." Exh. D-1, bulletin, p. 65.

f) According to the provisions of the student handbook entitled "Due Process for Handling Conduct Situations," dismissal for, inter alia, separating from and/or divorcing one's spouse cannot occur until:

> (a) The student has been given an initial hearing with the Executive Vice President (in this case Dr Stewart) where he is informed "of all details of the process" and, if appropriate, provided with a written, signed complaint;
>
> (b) If the student receives a written, signed complaint, he then has a second interview with the Executive Vice President (again, Dr Stewart) where the alleged violation is discussed and the student is given an opportunity to submit a written counter-statement. Additionally, a written continuity report must be prepared at this stage;
>
> (c) Assuming that the matter is not resolved in favor of the student at this level, the student is given the right to read the continuity report in its entirety before the case is submitted to a Student Affairs Committee for a hearing at which time the student has the right to be present along with a representative and any witnesses whom he desires to call. Assuming that the Student Affairs Committee confirms the disciplinary decision, the student then has the right to appeal to the President of the

School. Plaintiff's Petition for Specific Performance and Injunctive Relief, par. 6; Exh. D-2, pp. 26-27.

g) On August 4, 1987, petitioner received a letter from Dr. Don H. Stewart, Executive Vice President, stating, inter alia, the following:

(a) A meeting of the Student Affairs Committee[2/] was held on July 31, 1987;

(b) At the meeting, Petitioner was accused of having separated from his wife and considering a divorce;

(c) Petitioner could not continue in his degree program and must vacate the campus where he is living in his trailer with his wife and two children; and

(d) "The action of the Committee is final. According to institutional policy long enforced, the possibility of returning to this Seminary is virtually non-existent when termination follows probation."

Plaintiff's Petition for Specific Performance and Injunctive Relief, par. 8.

2/ The Student Affairs Committee is composed of the Executive Vice President, the Vice Presidents for Academic and Business Affairs, Director of Admissions, Academic Counselor, Faculty members (4) and students (2).

h) Plaintiff has never been on probation and has never separated from his wife. Plaintiff's Petition for Specific Performance and Injunctive Relief, par. 9.

i) On August 19, 1987, Babcock sought and was awarded a Temporary Restraining Order enjoining the School from interfering with his right to register for fall semester classes. R-I. Prior to the hearing on the request for permanent injunction, NOBTS interposed a peremptory exception of lack of jurisdiction, claiming it was a church and "the subject matter of the plaintiff's suit is about the internal affairs of administration of . . . (ministers)." The Exception was heard December 21, 1987, and dismissed March 18, 1988. R-II.

j) NOBTS admits that it does not have the power to ordain or to expel ministers. R-III, pp. 65-66.[3/] Babcock's expulsion, therefore, could not affect his ministerial status. R-III, p. 182.

k) NOBTS is an educational institution accredited by The Southern Association of Colleges and Schools ("S.A.C.S."), the regional accrediting agency for all institutions of elementary, secondary and higher education, both public and private, in the southern region. (R-III, pp. 69-70). The School is regularly reviewed by S.A.C.S, and is required to abide by the same standards as all other accredited schools in order to keep

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3/ It follows, of course, that the Student Affairs Committee can neither ordain nor expel ministers.

its accreditation. (R-III, pp. 70 & 90.) These standards include adherence to academic freedom (R-III, p. 91 and Exh. P-1, SACS Criteria), and a broadly promulgated statement of procedures in student disciplinary matters. (R-III, p.93 and Exh. P-1). Babcock was expelled without adherence to the latter. (R-III, p.93, printed in the student Handbook, Exh. D-2, pp. 26-27.).

1) New Orleans Baptist Theological Seminary awards many of the same degrees as do Duke University, Harvard University and the University of Alabama, e.g. the Master of Religious Education, Master of Church Music, Doctor of Musical Arts, Doctor of Theology, and Doctor of Education degrees. (R-III, pp. 94-97). Course credits earned at New Orleans Baptist Theological Seminary are transferable to other secular institutions of higher education. NOBTS accepts credits earned at other secular institutions. (R-III, pp. 103-104). The School issues grades and utilizes the semester system. (R-III, p. 104).[4/]

4/ The School's students have library privileges at Dillard, UNO and Tulane University. (R-III p. 104). Among the courses offered by the School and included in Babcock's curriculum are Stress Management, Human Development, Behavioral Family Therapy and Mental Disorders and Treatment (R-III pp. 178-79). Other courses offered include Orchestration Techniques, Eighteenth Century Counterpoint (R-III p. 138), Foundations in Educational Psychology and Social Work Institutions. See NOBTS Bulletin, pp. 105 et seq. In Appellant's desperation to characterize everything as religious, Dr. Stewart said that degree requirements of research methodology and statistics had a wholly religious purpose. (R-III, pp. 99-100).

m) The School's officers include a Vice-President for Academic Affairs, Vice-President for Business Affairs, a Director of Development, a Director of Admissions and a Registrar. (R-III, p. 103).

n) New Orleans Baptist Theological Seminary depends on both federal and state governments in pursuing its educational mission. For instance, it obtains authority to grant degrees from the State of Louisiana. (R-III, p.71). Like other schools, NOBTS provides extensive data on both faculty and students to the federal government through the State of Louisiana, via regular submission of such data to a program called the Integrated Post Secondary Education Data Systems ("IPEDS") (R-3, p. 86 and Exh. P-2). IPEDS requires information as to the School's income, expenditures and holdings; as to the sex, rank, salaries and fringe benefits of its faculty; as to the number and types of degrees it awards; as to student fees, cost of books and room charges; as to the race, sex and matriculation status of students. (Exh. P-2(a),(b)).

o) The School's dependency also involves certification of its students to the federal government so that their Guaranteed Student Loans may be deferred (R-III, pp. 84-85) and so as to facilitate their receipt of funds from the Veterans Administration. (R-III, p. 75-76). The Veterans Administration also requires that the School submit its student handbook containing a "due process" assurance (R-III, p. 78), which the

School has done. The School is ready and willing to open its books to governmental entities at any time such would be necessary for the School to retain its accreditation or eligibility for interest deferrals on Guaranteed Student Loans and for Veterans Administration benefits to accrue to its students. (R-III, pp. 159-160).

ISSUES TO BE RESOLVED BY THIS COURT

a) Is an institution which (1) has students, (2) has courses, semesters, faculty, a Vice President of Academic Affairs, a Vice President of Business Affairs and a Registrar, (3) is accredited by the Southern Association of Colleges and Schools, (4) is licensed by the State as an educational institution, (5) reports to the federal government that it is an educational institution, (6) transfers course credits to and from wholly secular colleges and universities and (7) awards degrees a school or a church?

b) Does the Southern Association of Colleges and Schools accredit churches or schools?

c) Is an entity which is required to give assurances of fairness to the federal government and to its accrediting association in exchange for valuable benefits, a school or a church?

d) Is NOBTS, which represents itself to the federal and state governments, its accrediting association, and potential students as a school, precluded from asserting that it is not a

school and acting arbitrarily after a student has relied on its promise in choosing to enroll at NOBTS?

e) May a student pursuing a degree in marriage and family counseling sue the school in which he is enrolled to honor the promises contained in the student handbook?

f) Assuming NOBTS is a church, may a student pursuing a degree in marriage and family counseling sue to honor the promises contained in the Student Handbook?

g) Assuming NOBTS is a church, may the Louisiana judiciary entertain a suit by a psychology student, based on its contract with the student or as a third party beneficiary of its promises to the federal government and S.A.C.S., for expelling him without due process and for having separated from or divorced his wife when neither is true?

h) Are divorce or separation ecclesiastical or civil law questions?

i) Is breach of or nonadherence to contracts a tenet of the Baptist Church? Stated differently, absent involvement of a religious tenet, can there be excessive entanglement or impairment of the freedom to exercise religion so as to violate the U.S. and Louisiana Constitutions?

ARGUMENT

A. Babcock Prevailed On The Merits Without A Fight.

NOBTS never seriously challenged the merits of Babcock's claim. Rather, the School excepted to jurisdiction, objected to any evidence even remotely bearing on the merits being presented (R-III, pp. 105-106) and then sought and executed a consent final judgment granting all relief sought by Babcock after the Exception was denied and no wonder.

Rudolph and Suzanne Babcock have never separated or divorced.[5/] Given the above, NOBTS executed a consent final judgment and did not choose to appeal the issuance of a permanent injunction enjoining the School from expelling Babcock based on an alleged separation or divorce and compelling it to reinstate his scholarship.

B. NOBTS Is A School.

1. Characterizations are not dispositive.

NOBTS may choose to call itself a church, but characterizations are not dispositive. Nomen non sufficit, si res non sit de jure aut de facto. See e.g. Nash v. Curette, 215 La. 109, 39 So.2d 840 (1949) (judge granted "suspensive" appeal which was only devolutive, given the nature and timing of the appeal); Due v. Due, 342 So.2d 161 (La. 1977) (husband's naming

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5/ NOBTS' claim on page 10 of its brief that it avoided trial on the merits because of a purported chilling effect on its constitutional rights evinces a lack of candor.

of contingent-fee contract as "aleatory" does not make it a non-asset of the community); Commissioner v. Culbertson, 337 U.S. 733 (1949) (characterization of business arrangement as partnership rejected); Earman Oil Co., Inc. v. Burroughs Corp., 625 F.2d 1291, 1295 (5th Cir. 1980) (without evidence of the anticipated value of equipment over the term of the "lease", court could not characterize with certainty whether the transaction was a sale or a lease) and Holden v. Placid Oil Co., 512 F.Supp. 644 (E.D. La. 1981) (claim of entitlement to recovery for breach of implied warranty under contract characterized as a construction contract declined as the contract was in reality one to provide personal property rather than services, i.e., it was a sale and the claim was, therefore, prescribed).

2. **The facts show NOBTS is a school.**

In exchange for accreditation and for certification as an eligible institution for Veterans Administration benefits, one of the requirements to which NOBTS had to submit was to provide assurance that the promulgated procedures for student discipline would be followed. (R-III, p. 93 and Exh. P-1 and D-2, pp. 26-27). In consideration for these promises, NOBTS obtained eligibility for its students to receive Veterans' benefits. (R-III, p. 75). Appellee is unaware of any church's eligibility for Veterans Administration benefits but has personal knowledge

of the fact that schools are.[6/] Equally important, NOBTS received accreditation by S.A.C.S. Appellee is unaware of S.A.C.S. having ever accredited a church but based on evidence adduced is aware that S.A.C.S. does accredit schools.

S.A.C.S. is a quasi-public agency whose approval is of great value and importance to the institution which it reviews. NOBTS sought and received S.A.C.S. accreditation. (Exh. D-1, Bulletin at 2, 40). In seeking and receiving regional accreditation, NOBTS has demonstrated its desire to avail itself of the many benefits which accreditation offers. Case law is replete with evidence of the high level of importance placed on this award by colleges and universities, principally through lawsuits against the accrediting associations for having refused or withdrawn accreditation.

Recognition of this fact has led one commentator to note that "the reputation of an institution, and consequently its ability to operate successfully, can be adversely affected by lack of accreditation." J. A. Rapp, 1 Education Law §308 [2][a]. In Parsons College v. North Central Association of Colleges and Secondary Schools, 271 F. Supp. 65 (N.D. Ill. 1967), a liberal arts college which lost its accreditation sought an injunction

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6/ Prior to coming to New Orleans, Babcock's line of work was establishing flight schools. As such, he knew firsthand of the assurances required by the Veterans Administration, being required to give those assurances on behalf of his flight schools. (R-III, pages 171-1).

against the accrediting agency. The court found that loss of accreditation "would threaten a loss of current student enrollment, a decrease in the number of new students, and the resignation of some faculty members," (Id. at 69) working irreparable harm on the institution.7/

The purposes of accreditation have been listed by the U. S. Department of Education as follows:

1) Certifying that an institution has met established standards;

2) Assisting perspective students in identifying acceptable institutions;

3) Assisting institutions in determining the acceptability of transfer credits;

4) Helping to identify institutions and programs for the investment of public and private funds;

5) Protecting an institution against harmful internal and external pressures;

6) Creating goals for self-improvement of weaker programs and stimulating a general raising of standards among educational institutions;

7) Involving the faculty and staff comprehensively in institutional evaluation and planning;

8) Establishing criteria for professional certification, licensure, and for upgrading forces offering such preparation; . . .

Cited in J. Rapp, 1 Education Law, § 3.08 [1][a]. The purpose of

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7/ The court refused the injunction because the agency had committed no wrongful action.

accreditation furthers the mission and operations of a school or university, but not a church.

Given the above and, not surprisingly, NOBTS represents itself to all as a school. In its own Bulletin, its principal medium of representation to the public, (Exh. D-1, p. 2), NOBTS states that its purpose is "to provide quality education." Further, it defines and identifies itself as follows, and in this order of priority:

(1) "an academic community," then

(2) "a denominational agency," and only then

(3) a "fellowship of faith".

Last, but not least, NOBTS could neither ordain nor expel Babcock from the ministry of which he was already a member. It, therefore, follows that the Student Affairs Committee could neither ordain not expel Babcock from the ministry. Babcock is unaware of any church that has a student affairs committee unless one is talking about "Sunday School". College and Universities, of course, typically have student affairs committees.

NOBTS is, accordingly, a school.

C. Schools Are Subject To The Jurisdiction Of The Court In Disciplinary Cases.

Courts have not hesitated to hear disputes between schools and their students. These disputes are generally either academic or disciplinary. Considerable deference has been given

by the courts to actions resulting from the application of academic judgment.

The courts, however, have taken a different stance when a disciplinary matter is at issue because "suspension or expulsion for causes unrelated to academic achievement...involve determinations quite closely akin to the day-to-day work of the judiciary . . . [and] courts have, therefore, looked much more closely at the actions of educational institutions in such matters." Tedeschi v. Wagner College, 404 N.E. 2d 1302, 1304 (N.Y. 1980). See also Goss v. Lopez, 419 U. S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975); and Fussell v. Louisiana Business College of Monroe, Inc., 478 So.2d 652 (La. App. 2d Cir. 1985).

Moreover, there is an abundance of authority holding 1) that an institution is bound by its own published rules and procedures concerning student discipline and 2) that dismissals may be neither arbitrary nor capricious. Slaughter v. Brigham Young University, 514 F.2d 622 (10th Cir. 1975), cert. denied 423 U. S. 898 (1975); Lexington Theological Seminary v. Vance, 596 S.W. 2d 11 (Ky. App. 1979); Tedeschi v. Wagner College, 427 N.Y. Supp. 2d 760 (N.Y. App. 1980); Coveney v. Holy Cross College, 445 N.E. 2d 136 (Mass. 1983); Fussell v. Louisiana Business College of Monroe, Inc., 478 So.2d 652 (La. App. 2d Cir. 1985)[8/]

8/ The relationship between a student and a private educational institution is generally accepted as contractual. That is, in consideration for the performance of certain (continued...)

In summary, NOBTS is a school. Students can maintain actions against schools where discipline is imposed in contradiction of the school's own rules and without any cause. Judge Katz's decision and the consent final judgment, therefore, should be affirmed.

Despite conceding the merits, the School, has belatedly argued that, while there is judicial review of student disciplinary decisions (Appellant's Brief at 52), there is strict judicial deference toward purely academic decisions by the institution. Appellant's Brief at 48-51. The School then impermissibly claims he was expelled for academic reasons.[9]

8/ (...continued)
obligations by the student, the institution agrees to provide the desired education and its credentials. Fussell v. Louisiana Business College of Monroe, Inc., 478 So.2d 652 (La. App. 2d Cir. 1985); Tedeschi v. Wagner College, 404 N.E. 2d 1302 (N.Y. 1980); Napolitano v. Trustees of Princeton University, 453 A.2d 279 (N.J. 1982); Lexington Theological Seminary v. Vance, 596 S.W. 2d 11 (Ky. App. 1979).

9/ Appellant has incorrectly raised the issues of judicial deference to academic decisions, academic freedom, and due process in private schools for the first time on appeal. Uniform rules -- Courts of Appeal, 1-3. On the trial of Appellant's exception, Appellant did not at any time argue, elicit testimony or produce documents to the effect that the court lacked jurisdiction to involve itself in purely academic decision making. In fact, to have done so would have been inconsistent with the Exception and would have really been addressed to the merits. It is thus inappropriate and untimely for this court to consider the arguments proffered in Appellant's Brief, pp. 47-52. Krauss Company v. Develle, 236 La. 1072, 110 So.2d 104 (1959); Mundy v. Gentilly Oaks, Inc., 227 La. 118, 78 So.2d 530 (1955); Handy v. Cheatum, 410 So.2d 322 (La. App. 4th Cir. 1982); Wm. B. Coleman Co., Inc. v. Ackel, 459 So.2d 596 (La. App. 5th Cir. 1984). Babcock proceeds, however, in an abundance of caution and (continued...)

The School's position is grossly inconsistent with its letter of expulsion[10/] and the consent final judgment. Assuming the Court does not stop here, Appellant has had to distort the notion of academic judgment and freedom to assert such a position and the School's arguments are meritless. The School remarkably begins by stating that:

> "[t]he controversy between the seminary and Babcock related to his moral standards and his treatment of his wife in the light of the seminary's expectations; in short, his ministerial fitness. These are matters which are academic." Appellant's Brief p. 48; Emphasis added.

Since Appellant has otherwise argued that they are theological matters (Appellant's Brief at 22, 28), it is fascinating to see how thin the School draws the line between academic and ecclesiastical questions. At least it would be interesting if characterization of a person's "moral fitness" for a given career as academic were not patently absurd.

9/ (...continued)
without waiving the assertion that NOBTS cannot now raise the issue to obtain reversal.

10/ The nonacademic nature of Babcock's dismissal is further borne out by the fact that the required "due process" statement under the provisions of which Babcock was dismissed (R-III, p. 93), is entitled "Due Process for Handling Conduct Situations" (emphasis added) (Exh. D-2 at 26-27). The School characterized it correctly the first time.

In support of its claim that Babcock's dismissal was for academic reasons, NOBTS cites Regents of University of Michigan v. Ewing, 474 U.S. 214, 106 S.Ct. 507 88 L.Ed. 2d 523 (1985). There, Ewing's dismissal for academic reasons was upheld because it was "a genuinely academic decision," (Id. at 513), based as it was on "an unenviable academic record characterized by low grades, seven incompletes, and several terms during which [Ewing] was on an irregular or reduced course load." Id. at 514. Ewing had also failed his medical boards. As the Supreme Court's characterization of the word "academic" indicates, the plain meaning of the word clearly excludes the Babcock decision, since Babcock's academic record was never questioned.

Appellant also cites Board of Curators of University of Missouri v. Horowitz, 435 U. S. 78 98 S.Ct. 948, 55 L. Ed. 2d 124 (1978), in support of the academic deference principle; but here, too, the student, Horowitz, was dismissed for having dismally failed the clinical aspect of her medical program. Babcock, however, has neither allegedly nor actually failed any course. The decision to expel him was obviously nonacademic.

In sum, Babcock was allegedly expelled for disciplinary, rather than academic reasons. The expulsion was accomplished without due process and without evidence of a separation or divorce. See the Consent Final Judgment which, as to the merits, has not been appealed.

D. **The School's Promise Of Fairness In Dealing With Its Students Was Made Not Only To Babcock, Its Student, But Also To Other Private And Public Entities For The Benefit Of Babcock; It Cannot Now Refuse To Abide By Its Promise.**

As set forth above, NOBTS received valuable consideration for its representations and assurances to federal and state governments as well as S.A.C.S.

La. Civ. Code Arts. 1978-81 give certain rights to the third party beneficiaries of promises made for their benefit. Babcock is obviously a beneficiary of the promise of fairness made to the S.A.C.S. and to the Veterans Administration. See Lemon v. Bossier Parish School Board, 240 F. Supp. 709 (W.D. La. 1965), aff'd 370 F.2d 847, cert denied 388 U. S. 911, 87 S. Ct. 2116, 18 L. Ed.2d 1350 (1967).

There, black children sued to attend desegregated parish schools. In finding standing to sue, the court held that the children were the beneficiaries of the assurances made by the School Board to the federal government that, in exchange for construction funds, "federal" children would be educated as other parish children. As third party beneficiaries under Louisiana law, the court held that they could sue for enforcement of the assurances made for their benefit stating: "having thus obligated themselves, defendants are now estopped by their contractual agreement and their acceptance of federal funds paid pursuant

thereto, to deny that plaintiffs are entitled to the same rights to school attendance as are residential children." Id. at 713.

Thus, Babcock, as the beneficiary of the assurance of fairness exacted by S.A.C.S. and the Veterans Administration, has the right to sue the School as promisor. Judge Katz's decision and the consent final judgment should be affirmed.[11/]

E. Babcock's Expulsion By The Student Affairs Committee Does not Involve Excessive Entanglement.

1. The Constitutions

Both the Federal and Louisiana Constitutions prohibit legislatures from enacting "laws respecting an establishment of religion..." U. S. Const. Amend I and La. Const. Art. I §8.

11/ In representing itself to the public, including Babcock, as an accredited institution of higher education which subscribes to principles of fairness in its dealings with its students, the School bound itself. The civil law principle, venire contra factum proprium non valet (one cannot go counter to one's own acts), recently recognized in La. Civ. Code Art. 1967 (detrimental reliance) precludes one from representing oneself in a certain way and then acting inconsistently with the representation.

Babcock chose to enroll for his counseling credentials at an educational institution which was accredited and certified, knowing that certain standards would have to be met, among them a standard of fairness in student disciplinary matters.

His enrollment at NOBTS created the contract, (Fussell, 478 So.2d at 654), demonstrating his reliance. The School must be held to this contract.

2. **"Establishment Clause" principles**

"In determining whether a congressional enactment violates the establishment clause, the Supreme Court has examined three principal criteria: (1) whether the statute has a secular legislative purpose, (2) whether the principal or primary effect of the statute is neither to advance nor to inhibit religion, and (3) whether the statute fosters "an excessive government entanglement with religion." E.E.O.C. v. Mississippi College, 626 F.2d 477, 486 (5th Cir. 1980) (citations omitted).

3. **Applicable Statutes**

Assuming arguendo that Civil Code Articles are statutes within the meaning of the Constitutional provisions cited above, Louisiana law authorizes actions for breach of contract.

4. **Contracts have a secular purpose**

NOBTS cites no authority for the proposition that enactment of the provisions relating to contracts has a sectarian purpose and no wonder. The Articles are wholly secular thereby showing the absence of a constitutional infringement.

5. **Contractual Articles neither promote nor inhibit religious activity.**

The School adduced no evidence and cites no authority for the proposition that enactment of contractual Articles inhibits the religious activity and no wonder. There is

none. The Articles are entirely neutral thereby showing the absence of a constitutional infringement.

6. Contractual Articles do not foster an excessive government entanglement with religion because breach of and nonadherence to agreements is not a tenet of the Baptist faith.

By virtue of its representations, assurances and agreements, the School offered Babcock and all other students "due process" and informed them that they would be expelled for separation or divorce. The handbook and bulletin represent a contract between the School and S.A.C.S. for the benefit of, inter alia, Babcock. At issue, therefore, is whether interpretation or construction of it is ecclesiastical. Stated differently, at issue is whether breach of the agreement is a tenet of the Baptist faith.[12/]

Courts have not hesitated to assert jurisdiction over churches where the issues involved were nonecclesiastical. EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1977) (sex discrimination is not a tenet of the Baptist faith, and so the EEOC might investigate discrimination charges at this

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12/ Appellant admits that the relationship may be contractual; but claims that enforcement of it requires dismissal of Babcock's Petition because NOBTS reserved the right "to make spiritual judgments concerning his fitness..." and that he was implicitly expelled because of such. (Appellant's Brief at pp. 37-38). NOBTS is trying to alter the facts of this case. Babcock wasn't expelled pursuant to the provisions cited by NOBTS on p. 38 of its brief. Babcock was expelled because he was allegedly separated or divorced. Regardless, even if NOBTS is correct, a determination of unfitness for nonacademic reasons is still a civil controversy and a subject of jurisdiction.

Baptist-owned college); Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977), cert. denied 434 U.S. 1063, 98 S.Ct. 1235, 55 L.Ed.2d 763 (1978) (right to practice racial discrimination not a religious but a social or political belief so as to subject defendant to suit for breach of right to contract under 42 U.S.C. § 1981); Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980) (since prohibition of interracial dating by Baptist owned school was not a tenet of the Baptist Church, "no valid religious belief has been called into question" and plaintiff can maintain suit under 42 U.S.C. § 1981 for breach of contract); Ninth & O Street Baptist Church v. EEOC, 616 F.Supp. 1231 (W.D. Ky. 1985) (EEOC allowed to investigate sex discrimination charge); Lexington Theological Seminary vs. Vance, 596 S.W. 2d 11 (Ky. App. 1979) (First Amendment Challenge to suit by student rumored to be homosexual for denial of a degree denied because there was no religious issue involved; rather it was a purely contractual matter).[13/]

13/ These cases are fully consistent with the "neutral principles" of law analysis set forth in Jones v. Wolf, 443 U. S. 595 (1979). In Jones, the Court recommended (but did not limit) the doctrine's use in church property disputes, allowing the language of deeds, church charters and provisions of the constitution of the general church to be examined and interpreted by the courts, entailing "no inquiry into religious doctrine," and relying "exclusively on objective, well established concepts of trust and property law familiar to lawyers and judges." Id. at 603. Its application was applied and extended by the Louisiana Supreme Court to all nonecclesiastical disputes Fluker Community Church v. Hitchens, 419 So.2d 445, 447 (La. 1982), LeBlanc v. Davis, 432 So.2d 239, 242 (La. 1983). See also Smith

(continued...)

Babcock does not assert, and knows of no evidence whatsoever, that breach of contract is a tenet of the Baptist faith. NOBTS has adduced no evidence that it is.

In fact, Appellant does not believe that divorce and separation are morally wrong or contrary to religious doctrine, as the School admits divorced and maritally separated persons as students. Its divorce policy as to admissions only forbids entry to such persons within one year of the divorce or settlement (Exh. D-1, Bulletin at 65). More importantly the Bulletin, Id., explains that religious dogma, morality and sanctity have nothing to do with the prohibition. Rather, the underlying reason is so that the "resultant problems will not become a disturbance to relations with students here . . . ." The reason is thus not religious, but academic, social and/or emotional so that students will not be disturbed in their studies. Judge Katz, accordingly, had the power to determine

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13/ (...continued)
v. Riley, 424 So.2d 1166, 1171 (La. App. 1st Cir. 1982) (jurisdiction existed to interpret church's articles of incorporation and to hold that its pastor had illegally excluded women from the church's Board of Trustees).

Although appellant has declared the doctrine dead as a result of limitations placed on it by such as the Hull and Crowder decisions, (Appellant's Brief at 23), the concept that the language of a document written in a tongue readily readable by a lay person should be open to examination and interpretation by a judge as to its meaning in lay terms has not died, as the above cited Louisiana cases demonstrate.

whether the Student Affairs Committee impermissibly expelled Babcock on the basis of a purported separation or divorce.

Moreover, one need not consult the scripture or engage in religious mysticism to determine whether Babcock was expelled because he was separated or divorced. In fact, one only needs to examine La. Code Civ. Arts. 138-160 and La. R.S. 9:301 et seq. to see what separation and divorce mean.

The School, nevertheless, claims the Petition is beyond the jurisdiction of the court. In support of its contention, the brief is redolent with pithy quotations. Yet, NOBTS cites not a single case dealing with contracts, divorce, separation, or even with the relationship between a seminary and its students as an ecclesiastical issue. Rather, the School cites cases dealing with the defrocking of a bishop (Serbian Eastern Orthodox Diocese vs. Milivojevich, 426 U. S. 696 (1976)); appointment to a Catholic chaplaincy (Gonzalez v. Roman Catholic Archbishop, 280 U. S. 1 (1929)); which of two bishops of the Russian Orthodox Church is to be seated (Kedroff v. St. Nicholas Cathedral, 344 U. S. 94 (1952)); whether a local or a general church controls church property (Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U. S. 440 (1969)); and a claim for unemployment compensation (Thomas v. Review Board, 450 U. S. 707 (1981)).

The only decision cited by Appellant worthy of any further mention in connection with the establishment clause is

E.E.O.C. v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981). There, the court dealt with defendant's challenge to an administrative subpoena for provision of employment related data. Its holding was bifurcated. First, the court rendered a statutory determination and held that Title VII of the Civil Rights Act of 1964 did not apply to the employer-employee relationship between a church and its ministers, which therein meant defendant and its faculty.[14/] The court further held that Congress intended for the E.E.O.C. to be able to regulate the relationship between employer (church) and employees (part time workers/full time students and support staff even though they were ministers).

Second, having held Title VII applicable to support staff and part time employees/students, the court had to examine whether construction of Title VII so as to render it applicable to part time employee-students and support staff was violative of the Constitution. The court held no Constitutional violation, even though four full time support staff were ordained ministers and even if one characterized the students as ministers in training (651 F.2d at 284-86) because the relief sought by the

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14/ See 651 F.2d at pp. 282-85. Note: Title VII clearly exempts from its coverage religious associations and educational institutions "with respect to the employment of individuals of a particular religion to perform work connected with carrying on...its activities." 42 U.S.C. § 2000E-1.

E.E.O.C. was "not an ongoing interference with the [Seminary's] religious practices..." 651 F.2d at 286.

Likewise, Babcock, a student, does not excessively entangle "church and state" by seeking to enforce a contract because it does not at all interfere with the NOBTS' religious practices.15/

7. Babcock's expulsion did not involve a matter of internal church discipline/a religious question.

Putting aside the fact that a school is not a church, Dr. Stewart admitted that the wording in the student handbook section "Due Process for Handling Conduct Situations," (Exhibit D-2 at 26-27), was applicable to Babcock, and was NOBTS' response to S.A.C.S.'s requirement to promulgate such a statement. (R-III, pp. 92-93).

Thus, the source of the procedure outlined was not internal to any church including NOBTS, assuming it is one, but was

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15/ Considering the nature and extent of the data already being submitted willingly to both state and federal governments and the required availability of enrollment and other data for Veterans Administration and Guaranteed Student Loan purposes, a court's "interference" as represented by Babcock's claim with the School's business would be minimal by comparison. Stated differently, with such "interference" by secular agencies already so evident in the affairs of the School, how can NOBTS be heard now to proclaim that one more secular entity, the civil court, has no right to investigate its contractual obligations to its students? The whole issue of EEOC v. Southwestern Baptist Theological Seminary was whether a secular agency, the E.E.O.C. had the right to request the very same information which New Orleans Baptist Theological Seminary has regularly offered to governmental entities!

required to exist by purely secular agencies, from which the School derives the benefits that flow from accreditation and certification. Moreover, Babcock has not been expelled from any church and Appellant's discussion of minister expulsion cases has no applicability to the facts herein. Babcock's expulsion by the Student Affairs Committee, accordingly, had nothing to do with internal church discipline and is reviewable by courts as no religious question was involved.

F. Review of Babcock's Expulsion By The Student Affairs Committee Does Not Infringe Upon The Free Exercise Of Religion.

1. The Constitutions

Both the Federal and the Louisiana Constitutions prohibit legislatures from enacting laws "prohibiting the free exercise" of religion. U. S. Const. Amend I and La. Const. Art. 1 § 8.

2. "Free exercise" clause principles

"In determining whether a statutory enactment violates the free exercise of a sincerely held religious belief, the Supreme Court has examined (1) the magnitude of the statute's impact upon the exercise of the religious belief, (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of religious belief, and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state."

E.E.O.C. v. Mississippi College, supra at 488 (citations omitted).

3. Applicable statutes and principles

At issue here is whether Louisiana Code Articles on contracts impinge upon the free exercise of religion. Ab initio, one must determine whether there is a sincerely held religious belief at issue. Fiedler v. Marumsco Christian School, 631 F.2d 1144, 1151 (4th Cir. 1980) (race discrimination - expulsion of white student for dating back student-found not to be a religious, but rather a social or political, belief and, therefore, plaintiff could maintain suit under 42 U.S.C. § 1981). See also Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977) (belief in propriety of racial segregation was social and political rather than religious).

4. Contractual Articles do not infringe upon the free exercise of religion as nonadherence to contracts is not a religious belief of the Baptist faith.

NOBTS adduced no evidence and cites no authority for the proposition that nonadherence to contracts was or is a tenet of the Baptist religion. Since there is no involvement of a sincerely held religious belief, there is no "free exercise" problem.

Appellant, nevertheless, asks this court to reverse in reliance on Crowder v. Southern Baptist Convention, 828 F.2d 718

(11th Cir. 1987). There, however, the issue was to determine which faction within the Southern Baptist Convention, the fundamentalist or the moderate group, should be seated as representatives to an ecclesiastical event which would determine major questions of faith for 37,000 churches. The court in Crowder considered the jurisprudence concerning hierarchical churches and concluded that the Southern Baptist Convention was among them. The court also held that since messengers there had addressed the highest tribunal of the Southern Baptist Church, interference was not appropriate.

In the present case, Babcock is a student who has expelled in utter disregard for the facts and promulgated procedures. The School, nevertheless, compares Babcock to the church messengers in Crowder, claiming that like the messengers, Babcock had sought redress first within the School's structure, was heard by the "highest tribunal" within the hierarchical church, and when he failed, looked to the civil courts. (Appellant's Brief at 30). The parallel must fall, first because of the incorrectness of appellant's facts: Babcock did not seek redress internally; he was abruptly expelled without an opportunity to plead his case and addressed the court immediately thereafter. The parallel also must fall for the reason that the decision to expel Babcock was made by the NOBTS Student Affairs

Committee.[16]

If NOBTS is, as it claims, an arm of this same Southern Baptist Church, how can Babcock have been heard and condemned to expulsion by its highest tribunal? Is there more than one that is "highest"? Or is the court to believe that the NOBTS Student Affairs Committee is the Southern Baptist Church's highest tribunal despite Crowder.

Crowder simply does not in any way undermine the soundness of Judge Katz's decision.

CONCLUSION

Eschew characterizations and obfuscation. NOBTS characterizes itself as a church and devotes most of its brief to extracting lofty quotes about the First Amendment from cases which simply confuse because of inapplicability.

NOBTS is an educational institution wholly owned and operated by the Southern Baptist Convention. Its ownership and control, however, does not alter the fact that it has all the characteristics of and operates like a school and that courts

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16/ Crowder is analogous to a Church administration or governance case. Courts have refused to interfere in administration and governance cases. E. g., McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972). McClure described selection of a minister and determination of salaries, assignments, etc., as matters of administration and governance. Babcock's case, of course, involves none of this.

have jurisdiction to review disciplinary actions by schools against its students.

Moreover, even if one views NOBTS as a church, Babcock's expulsion and Petition do not trigger the First Amendment because breach of contract isn't a tenet of the Baptist faith and one need only construe whether Babcock was separated or divorced, basic civil law concepts in order to decide the case.

This Court should know the following. Pursuant to the consent final judgment

(a) Rudolph G. Babcock's name appears on a list entitled "Applicants for Graduation" updated as of 3-13-89 (see Addendum)

(b) Rudolph G. Babcock received a letter of congratulations for his upcoming graduation on March 27, 1989 from Ellen Smith. Smith also requested permission to release his name to the media in Babcock's home town (see Addendum)[17/]

(c) Rudolph G. Babcock received a letter from Don H. Stewart on April 10, 1989 giving Babcock permission to remain on campus up to two weeks after his graduation (see Addendum)

17/ The release was sent to the Milwaukee Journal, the Tri Center Herald in Kennewich, Washington and to the newspaper in Chambersberg, Pennsylvania.

(d) Rudolph G. Babcock received a letter from Becky Brown dated April 12, 1989 offering her congratulations (see Addendum)

(e) Rudolph G. Babcock received a "Dear Graduate" letter dated April 21, 1989 (see Addendum)

(f) Rudolph G. Babcock received invitations to graduation exercises, breakfasts and dinner under letter dated April 26, 1989 (see Addendum)

(g) Rudolph G. Babcock received a note of congratulations on his graduation from the Foreign Mission Board on May 3, 1989 (see Addendum)

Yesterday, the day before the Brief was due, Babcock was informed that he would not be allowed to graduate. See Addendum. According to Appellant's counsel, someone decided to disallow the graduation because, but for this action, Babcock would have been expelled in August 1988 and not on the graduation list.

Rudolph Babcock personally wonders whether NOBTS has renounced the principle of "love thy neighbor as thyself?" The undersigned wonder whether NOBTS acted in order to maintain a live controversy (avoid mootness).

Regardless, affirmance is appropriate.

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Ellis B Murov
ELLIS B. MUROV

LEXINGTON THEOLOGICAL SEMINARY, INC., Appellant,

v.

Ottie David VANCE, Appellee.

Ottie David VANCE, Cross-Appellant,

v.

LEXINGTON THEOLOGICAL SEMINARY, INC., Cross-Appellee.

Court of Appeals of Kentucky.

May 18, 1979

Appeal was taken from a judgment of the Fayette Circuit Court, Charles M. Tackett, J., ordering seminary to grant a master of divinity graduate degree to an admitted homosexual. The Court of Appeals, Howard, J., held that words and phrases used in seminary's catalog, such as "Christian ministry," gospel transmitted through the "Bible," "servants of the gospel," "firmly committed to the role and mission with which they will begin their ministry," "fundamental character" and "display traits of character and personality which indicate probable effectiveness in the Christian ministry," were not vague or indefinite; thus, board of trustees of seminary had every right to exercise their sound discretion in the matter of granting a master of divinity graduate degree to an admitted homosexual.

Reversed.

Howerton, J., dissented and filed opinion.

1. Colleges and Universities ⇐9

Terms and conditions for graduation from private college or university are those offered by publications of college at time of enrollment and, as such, have some characteristics of contract.

2. Colleges and Universities ⇐9

College regulations defining student conduct, challenged on ground of vagueness, are not judged by degree of specificity required for penal statutes; nor are such regulations used in a vacuum, rather should be interpreted in conte. of their intended import.

3. Colleges and Universities ⇐9

Words and phrases used in seminary's catalog, such as "Christian ministry," gospel transmitted through the "Bible," "servants of the gospel," "firmly committed to the role and mission with which they will begin their ministry," "fundamental character" and "display traits of character and personality which indicate probable effectiveness in the Christian ministry," were not vague or indefinite; thus, board of trustees of seminary had every right to exercise their sound discretion in the matter of granting a master of divinity graduate degree to an admitted homosexual.

4. Colleges and Universities ⇐9

Courts will not generally interfere in operations of colleges and universities, especially in actions challenging institution's academic regulations, since courts possess minimum expertise in the area.

Herbert Sledd, William H. McCann, Brown, Sledd, McCann, PSC, Lexington, for appellant/cross-appellee.

Richard N. Rose, Lexington, for appellee/cross-appellant.

Before COOPER, HOWARD and HOWERTON, JJ.

HOWARD, Judge.

This is an appeal from a judgment entered in the Fayette Circuit Court ordering the Lexington Theological Seminary, Inc. (the defendant below) to grant a Master of Divinity graduate degree to Ottie David Vance (the plaintiff below), an admitted homosexual.

The trial court decided this case on a contractual basis. Briefly summarized, the trial court determined that the catalog issued by the Lexington Theological Seminary, Inc. (hereinafter referred to as the Seminary) fulfilled the requirements of a contract between the Seminary and Ottie

David Vance (hereinafter referred to as Vance). The trial court further determined that Vance had fulfilled all the academic and financial requirements needed as prerequisites for the granting of a degree. The court held that the catalog did not set forth reasonably clear standards concerning character traits and that none of the contract terms made clear that the Seminary could refuse to grant a degree to Vance because he was a homosexual.

Vance enrolled in the Seminary in September of 1972. In September, 1974, Vance applied to the faculty for admission to the degree candidacy program. The application was deferred until Vance fulfilled certain requirements relating to field experience.

Unbeknownst to the faculty or administrative staff of the Seminary, Vance was a homosexual and had actively engaged in this life style for a number of years. In September, 1975, Vance advised Dean Roy Graham of the fact that he was a homosexual, that he lived a homosexual life style and had been "married" to another man for six years, and that he now desired to come out of the closet. Dean Graham advised Vance to meet with Dr. Wayne H. Bell, president of the Seminary. Vance met with Dr. Bell and told him of his homosexual life style.

Dr. Bell emphasized to Vance that his life style and practice of homosexuality could impair the granting of a degree by the Seminary. Vance was advised that even if he met the academic requirements and was admitted to the degree candidacy program, neither of these factors guaranteed that he would be granted a degree. Vance testified that he was aware that the faculty and Board of Trustees must approve the granting of a degree and that he knew there was some question as to whether the faculty and/or the Board of Trustees would approve.

In January, 1976, Vance was informed that his application for degree candidacy was again being deferred until he could complete one particular course during the spring semester. Vance took the course and successfully completed it. In May, 1976, the faculty recommended that Vance receive his Master of Divinity degree. The Executive Committee voted not to approve the faculty recommendation and the full Board of Trustees subsequently ratified the Executive Committee's decision not to grant Vance a degree. Vance thereafter instituted suit, seeking to have his degree conferred.

Vance also sought compensatory damages for lost wages and the award of attorney's fees. The trial court held that Vance failed to prove any damages he sustained and did not award attorney's fees. These two issues are the subject of Vance's cross-appeal.

The Seminary argues three issues on appeal: 1) That the order compelling the conferring of the degree was a violation of the First Amendment right to freedom of religion. 2) that Vance failed to prove any contract between the parties and failed to prove a breach of contract by the Seminary or the fulfillment of obligations by Vance, and 3) that any alleged contract was rendered void because of Vance's failure to reveal that he was a homosexual at the time of admission to the Seminary.

This Court will not discuss the First Amendment argument since this Court believes, as did the trial court, that this is a contract case. This Court differs with the trial court in that this Court believes that reasonably clear standards concerning character were set forth in the catalog.

[1] The terms and conditions for graduation from a private college or university are those offered by the publications of the college at the time of enrollment and, as such, have some of the characteristics of a contract. *University of Miami v. Militana*, Fla.App., 184 So.2d 701, 704 (1966).

[2] College regulations defining student conduct, challenged on the ground of vagueness, are not judged by the degree of specificity required for penal statutes. Neither are these regulations used in a vacuum, but rather they should be interpreted in the context of their intended import. *Depperman v. University of Kentucky*, 371 F.Supp. 73, 78 (E.D.Ky.1974). In *Depper-*

man, the court held that the foll...ng regulation was not vague:

> Any student may be denied permission to continue enrollment in the College of Medicine if, in the opinion of the Faculty Council, his knowledge, character or mental or physical fitness cast grave doubts upon his potential capabilities as a physician.

In the instant case, the portions of the catalog for the school year 1972–1973, which are relevant to this case, read as follows:

1) The introductory page, entitled "Education For Ministry", contains the following two paragraphs:

> Lexington Theological Seminary is engaged at the graduate level in professional education for the Christian ministry. Finding its charter in the gospel transmitted through the Bible and borne through history by the ongoing life of the church, it seeks to equip its graduates to serve as contemporary servants of that gospel.
>
> By the time of graduation, students are expected, having worked through problems of vocational indecision, to be firmly committed to the role and mission with which they will begin their ministry.

2) The Master of Divinity Program is described in the following paragraph:

> The Master of Divinity program is a three-year course of study and is designed for those who desire to become pastors of local congregations, leaders of religious education, religious leaders at the state and national level, ministers of music, campus ministers, chaplains in hospitals and in the armed forces, missionaries, and leaders in other specialized ministeries.

3) The explanatory section for the application for degree candidacy contains the following paragraph:

> At the time of his application for candidacy, the student's overall seminary profile, including academic performance, field education leadership, financial responsibility, and fundamental ...racter, is evaluated by the faculty. N... student on probation may [be] admitted to candidacy.

4) The admissions standards and policies section contain the following paragraph:

> Lexington Theological Seminary will consider for admission applicants who hold the B.A. degree or its equivalent. Preference will be given to graduates of accredited institutions who have concentrated in the liberal arts, maintained a minimum of B average in their pre-seminary studies, and display traits of character and personality which indicate probable effectiveness in the Christian ministry.

The trial court believed that the Seminary should have defined what it meant and expected by the use of such words and phrases as "Christian ministry", "gospel transmitted through the Bible", "servants of the gospel", "firmly committed to the role and mission with which they will begin their ministry", "fundamental character" and "display traits of character and personality which indicate probable effectiveness in the Christian ministry." The trial court stated that, although the use of these words and phrases might be clear to the Board of Trustees, the meanings of these words and phrases were not clear to it [the trial court].

We disagree. Those words "can be easily understood by anyone who possesses the intelligence to gain admission to an accredited institution of higher learning." *Papish v. Board of Curators of University of Missouri*, 464 F.2d 136, 143 (8th Cir. 1972) reversed on other grounds, 410 U.S. 667, 93 S.Ct. 1197, 35 L.Ed.2d 618 (1973).

[3] Besides having meaning to anyone with enough intelligence to be admitted to a college, we believe that these words should have even greater meaning to a student who is actively seeking a degree in a religious field of study. We do not believe that the words and phrases used in the catalog were vague or indefinite.

In *Carr v. St. John's University, New York*, 34 Misc.2d 319, 231 N.Y.S.2d 403,

..ersed 17 App.Div.2d 632, 231 N.Y.S.2d 410, affirmed 12 N.Y.2d 802, 235 N.Y.S.2d 834, 187 N.E.2d 18 (1962), a Catholic university regulation stated that, in conformity with the ideals of Christian education and conduct, the university reserved the right to dismiss a student on whatever grounds the university deemed advisable. A divided court held that the dismissal of four students, two of whom were married in a civil ceremony and two of whom acted as witnesses, was within the discretion of the university and that the court could not review the exercise of that discretion.

The Seminary asserts that the order compelling the conferring of the graduate degree to Vance was a violation of the First Amendment. Again, we do not feel bound to decide this case on First Amendment grounds, but rather on the basis of whether the Seminary breached its contract to Vance by refusing to grant him his degree.

[4] The courts will not generally interfere in the operations of colleges and universities, especially in actions challenging the institution's academic regulations, since the courts possess minimum expertise in this area. *Depperman v. University of Kentucky, supra*, at pg. 76.

In 15A Am.Jur.2d *Colleges and Universities* § 31, at pgs. 292–293, appear the following statements concerning the conferring of degrees by a university:

> Universities and colleges are usually vested with the power to graduate and to confer degrees and diplomas on students who have complied with the requirements imposed by the regulations of such institutions. Where a student matriculates at a college or university, a contractual relationship is established under which, upon compliance with all the requirements for graduation, he is entitled to a degree or diploma. However, the faculty or other governing board of a college or university, which is authorized to examine the students and to determine whether they have performed all the conditions prescribed to entitle them to a degree or diploma, exercises quasi-judicial functions, *in which capacity its decisions are conclusive, except that a degree or diploma may not be refused arbitrarily.* (emphasis ours).

It is true that the Seminary is essentially a private graduate school. However, its main emphasis is on the training and education of people who desire to become involved in the Christian ministry. In this connection, Vance fully intends to become a minister and was not seeking this degree for any other purpose.

The trial court specifically held that it was not deciding the morality of homosexuality in this particular case, even though it can be a criminal offense under Kentucky law, KRS 510.100. Although this case can be decided under contract law, the question of morality of homosexual Christian ministers must be of overriding importance to an institution such as we have here that is engaged in the business or calling of training persons for the Christian ministry. It begs the question for Vance to argue that the secular world is becoming more tolerant of homosexuality as a viable life style. This conclusion on his part is speculative, but even if it is true, this argument is not relevant to the issues in the case.

Although we are living in a society that is more permissive in many respects than the societies in the recent past, the argument that Christian denominations or other religious groups should adopt the life style and morals of some segments of the population at any given time is ridiculous on its face. This type of argument can be made for gaining approval for many different activities which are completely contrary to the teachings of the Christian religion.

The Lexington Theological Seminary is an old and illustrious Seminary that has prepared ministers to preach the Christian gospel in the Disciples of Christ Church and other denominations. Therefore, it has the most compelling interest in seeing that its graduates who go forth with a Divinity degree, bearing the name and approval of the Lexington Theological Seminary, shall be persons possessing character of the highest Christian ideals. Therefore, the Board

of Trustees of the Lexington ological Seminary had every right, and . as their strict duty, to exercise sound discretion in the matter of granting a degree to Ottie David Vance.

In view of the circumstances shown in this case, we do not find that the Board exercised its discretion in an arbitrary manner or that same was abused. The trial court's decision in ordering the Seminary to grant Vance a Divinity degree was clearly erroneous. Furthermore, there was no estoppel shown precluding the denial of the degree by the Seminary. Vance proceeded to finish his studies at his own risk, after he revealed his homosexual life style. He was warned by the Seminary that this revelation might preclude the degree being granted.

The judgment of the trial court is reversed on the appeal and is affirmed on the cross-appeal. The trial court shall dismiss the complaint.

COOPER, J., concurs.

HOWERTON, J., dissents.

HOWERTON, Judge, dissenting.

I cannot agree with the opinion of my colleagues, although I am sympathetic with the desire of the trustees to withhold the seminary's degree from an avowed homosexual. For me, the problem of the seminary falls primarily on the actions, or inactions, of the dean, the president, and the faculty. If those seminary leaders cannot stand up for what is supposed to be right, then why should we expect the student, Vance, to interpret the meaning of the language in the catalog to exclude him from eligibility for a degree. Since neither the dean, the president, nor the faculty understood the catalog to clearly exclude homosexuals, their view certainly clouds any contrary meaning.

The trial court found the language in the catalog to be too ambiguous to exclude a homosexual such as Vance. Under the circumstances in this case, I agree. Except for the indecisiveness of the dean and the president, however, I would have agreed with the majority opinion and concluded that anyone intending to become minister in any Christian denomination should understand, or at least soon know, the attitudes toward homosexuality as are expressed in both the Old and New Testaments of the Bible.

Once the dean and the president were aware of Vance's intention to continue living as a homosexual, they could have reasonably expelled him. Such a decision would obviously have been upheld by all members of this panel, if Vance had bothered to challenge such a dismissal.

Vance voluntarily gave the dean and president this information in September, a whole school year before his time for graduation. At the beginning of his final semester, the seminary accepted more tuition, and Vance was advised what he must do to complete the requirements for the degree. Vance did all of these things and was then recommended for a Masters Degree by the faculty. Therefore, in addition to agreeing with the trial judge's finding that the catalog did not exclude homosexuals, I must also conclude that the seminary should be estopped from denying Vance his degree. The fact that Vance was given some weak warning would not overcome this.

I can certainly understand why the Board of Trustees would not wish to grant Vance a degree from the Lexington Theological Seminary, Inc., but granting the degree does not ordain Vance to become a minister in any church. Furthermore, degrees have been granted by this seminary to others who did not intend to become Christian ministers. For that matter, degrees have been granted to non-christians, who merely desired to become educated in the teachings of the seminary. In the future, the Board should consider revising the catalog to be more explicit on what is meant by "fundamental character." The Board might also make it clear that applications for degree candidacy will not only be "evaluated by the faculty" but will also be reviewed by the Board.

The seminary raised a question regard religious freedom and the separation of church and state. Under the peculiar circumstances in this case, and considering the nature of this particular seminary, I do not find that the trial court's judgment violates the constitutional requirements of religious freedom and the separation of church and state. The seminary also argued that Vance's original enrollment was based on fraud or mistake which would render any contract void. This point would be valid only if the catalog "contract" could be interpreted to exclude homosexuals. Since I have concluded that the language has been rendered meaningless, Vance's failure to disclose his life style and feelings on this moral issue could not constitute fraud on his part. This argument might have carried considerable weight, and the changed circumstances would probably have brought a different result, if Vance had not disclosed his homosexuality until he had completed all academic requirements for his degree.

Finally, I agree with the trial judge in that Vance proved no damages. Therefore, I would affirm the judgment of the trial court on the appeal and the cross-appeal.

Joe CLARK, Appellant,

v.

Ernest MASON, the Board of Elections of Rockcastle Co., Clyde Barnett, Victor Hysinger, Manuel Shepherd, and Money Ed Cummins, Appellees.

Court of Appeals of Kentucky.

May 25, 1979.

In an election contest action involving the office of magistrate, the Rockcastle Circuit Court, Phillip K. Wicker, J., entered judgment, from which respondent appealed. The Court of Appeals, Martin, C. J., held that fact that assignment of the action for trial on December 28 took place less than 30 days after service of summons, which occurred shortly after November 17, did not render it unnecessary for trial court to make a finding as to just cause for extension of time beyond the statutory 30-day limitation period.

Judgment reversed.

Elections ⇐ 300

Fact that assignment of election contest action for trial on December 28 took place on December 15, and, thus, the assignment had occurred within 30 days after service of summons, which took place shortly after November 17, did not render it unnecessary for trial court to make a finding as to just cause for extension of time beyond the statutory 30-day limitation period. KRS 120.155.

Carl R. Clontz, Clontz & Cox, Mount Vernon, for appellant.

Charles R. Coy, Coy & Coy, Richmond, for appellee Ernest Mason.

Before MARTIN, Chief Judge, and HOWERTON and LESTER, JJ.

MARTIN, Chief Judge.

This is an appeal based in part on a procedural error by the trial court in an election contest action involving the office of Magistrate in the Fifth Magisterial District of Rockcastle County. We think the procedural issue raised by appellant will be dispositive of this appeal.

Mr. Mason filed his petition on November 17, 1977, requesting a recount and contesting the election pursuant to KRS 120.155. This statute sets out the procedure to follow in a contest of a regular election and provides that evidence in chief for the contestant must be completed within thirty days after service of summons. Although we have not been informed by either party

jury's deliberations. It bore materially on whether the jury believed defendant's claim of an early turn into the deceleration lane. It also lent some credence to defendant's darting back and forth contention, which was much more possible to have occurred over a 75-foot or a 45-foot distance than at a 20-foot distance. Mrs. Harris, the driver of the car behind the Nitschke camper as it entered the exit lane, placed its entry quite close to the exit lane, and testified as to decedent's movements (not all of which could she see) that he hesitated and then ran quite fast when he disappeared from her view in front of the camper. Her testimony on those points would tend to negate defendant's contention that decedent darted back and forth. Moreover, both her markings on a photograph and defendant's wife's trial testimony placed decedent off the exit lane and on its left-hand shoulder at the time he was struck. In light of the foregoing, it is impossible to conclude that the jury's verdict may not have been different than it was had the Trial Judge not erroneously excluded the questions and answers he did.

In view of my conclusion concerning the deposition point, I deem it unnecessary to discuss the expert testimony rulings.

For the foregoing reasons, I vote to reverse the order of the Appellate Division and grant a new trial.

JASEN, GABRIELLI and JONES, JJ., concur with COOKE, C. J.

MEYER, J., dissents and votes to reverse in a separate opinion in which WACHTLER and FUCHSBERG, JJ., concur.

Order affirmed, with costs.

49 N.Y.2d 652

Nancy J. TEDESCHI, Appellant,

v.

WAGNER COLLEGE, Respondent.

Court of Appeals of New York.

April 1, 1980.

Parttime student who had been suspended from private college sued for damages and order compelling the college to reinstate her. The Supreme Court, Richmond County, Arthur S. Hirsch, J., 93 Misc.2d 510, 402 N.Y.S.2d 967, entered judgment for the college and the student appealed. The Supreme Court, Appellate Division, 70 A.D.2d 934, 417 N.Y.S.2d 521, affirmed and the student appealed. The Court of Appeals, Meyer, J., held that the college was bound by its guideline providing that student suspended or expelled for cause other than academic failure, without having had hearing before college court, had right to be heard by student-faculty hearing board which must present its findings to college president for final determination, thus it was improper to suspend student, in part on nonacademic grounds, even though she had met informally with college officials, and student was entitled to review of her suspension by the board and the president.

Order of Appellate Division reversed and case remanded to Supreme Court with directions.

Gabrielli, J., dissented and voted to affirm in the separate opinion in which Cooke, C. J., and Jasen, J., concurred.

1. Colleges and Universities ⇐9

Though matters involving academic standards of college are subject to judicial scrutiny, issue reviewed in such case is whether college has acted in good faith or its action was arbitrary or irrational, but in cases involving suspension or expulsion for causes unrelated to academic achievement, courts look more closely at actions of educational institutions.

2. Colleges and Universities ⇐9

When university has adopted rule or guideline establishing procedure to be followed in relation to suspension or expulsion, that procedure must be substantially observed.

3. Colleges and Universities ⇐9

Private college was bound by its guideline providing that student suspended or expelled for cause other than academic failure, without having had hearing before college court, had right to be heard by student-faculty hearing board which must present its findings to college president for final determination; thus it was improper to suspend student, in part on nonacademic grounds, even though she had met informally with college officials, and student was entitled to review of her suspension by the board and the president. U.S.C.A. Const. Amends. 5, 14.

Harry Grossman, New York City, for appellant.

Howard Newman, Kew Gardens, for respondent.

OPINION OF THE COURT

MEYER, Judge.

This appeal concerns the effect of guidelines or rules published by a private educational institution upon its right to suspend a student. We hold that such an institution is bound by its own rules and, therefore, reverse the order of the Appellate Division and remit the matter to the Supreme Court, Richmond County, for entry of a judgment in accordance with this opinion.

Plaintiff Nancy Jean Tedeschi was admitted to Wagner College, a private institution, in September, 1976. She was a part-time student taking courses in mathematics, Latin and psychology. Her performance during the fall semester presented both academic and social problems, however. Dr. Thompson, her Latin professor, testified that she did not participate in class, did not know the required material and only once of the several times called upon was able to answer correctly even a simple question about Latin grammar. Her conduct during class was also disruptive in that three or four times during each period she would pick up her handbag and leave the room, returning after two to five minutes.

On the evening of December 20, 1976 Ms. Tedeschi sat for her Latin examination, but at the end of it dramatically tore up her blue book and did not hand it in. In response to her question, Dr. Thompson advised her that without an examination score her grade for the course would be an F. Beginning at 4 a. m. the next morning and continuing until late in the evening of December 22, Dr. Thompson was subjected to a barrage of telephone calls in which Ms. Tedeschi repeatedly threatened to commit suicide, or to "fix" Dr. Thompson, and at one point appeared in a distraught condition at the front door of his home. Only when the police were summoned and advised plaintiff of the possible criminal consequences did the calls cease.

On January 10, 1977 through his secretary, Dr. Wendel, the academic dean, contacted plaintiff and her mother by telephone to arrange a meeting with them for the purpose of discussing plaintiff's academic situation, in view of her incomplete grades in two courses. Plaintiff, however, refused to meet stating that there was no problem. There followed, nevertheless, another series of harassing calls by plaintiff to Dr. Thompson. Later that evening in a telephone conversation between Dr. Thompson and Nancy's mother, Mrs. Tedeschi, refused to discuss the matter with college officials and insisted that any problem should be presented to her in a formal letter from the college. The next day plaintiff was orally advised by Dr. Wendel that she was suspended by the college because of her bad character and the repeated disruption of her Latin class. Thereafter she met with the academic dean, the dean of students and an assistant to the president, who testified that during the interviews plaintiff's conduct was irrational and discussion fruitless. By letter dated January 13, 1977 plaintiff was advised by the dean of stu-

dents, Dr. Guttu, that after consultation with Dr. Wendel and other members of the faculty and the administration, she was "withdrawn from classes for the 1977 spring semester" but could, if she wished, reapply in the fall. Shortly thereafter plaintiff's tuition for the spring semester was refunded. Plaintiff's mother testified that she called the school several times to arrange a hearing, but without success.

Plaintiff then began this action alleging that she had not been granted a hearing or afforded an opportunity to defend herself and that she had been arbitrarily frustrated in completing her education. She asked for an order reinstating her and for damages. The trial court found that there was no constitutional violation since Wagner College was not State involved, that it could not review the decision to suspend plaintiff on the basis of her academic record, that the disciplinary aspects of her suspension were not arbitrary, that the college was obligated only to act in good faith, that the informal procedure followed was believed to be in plaintiff's best interests and that she had failed to prove any damage. On appeal from the judgment for defendant entered on that decision, the Appellate Division affirmed by a divided court. The majority took note of the college guideline quoted below but held that plaintiff had rebuffed several attempts by the college to arrange a conference; the dissenters reasoned that the relationship between a college and its students is contractual and that the college was bound to follow its own rules relating to suspension. Though we do not arrive at our conclusion on exactly the same reasoning, we agree with the dissenters below that the college has not conformed to the procedure its guidelines prescribed and that plaintiff is entitled to have it do so. We, therefore, reverse.

The guideline referred to is part of a publication distributed by the office of the dean of students entitled 1976–1977 Guidelines of Wagner College. The portion pertinent to this appeal reads:

"Whenever it shall appear that any student is not making satisfactory progress in his studies, and that his scholastic standing does not meet the requirements specified by the Committee on Academic Standards he shall be discharged from the College. If for any other cause a student is deemed to be an unfit member of the College, the Dean of Students may notify parents or guardians in order that they may have an opportunity to withdraw the student.

"A student may be suspended or expelled from the College by the Dean of Students or the Dean of Academic Affairs. If he is suspended or expelled for any cause other than failure in his academic work, and has not had recourse to a hearing before an established College Court, he shall have the right to be heard by the Student-Faculty Hearing Board which shall present its findings to the president of the college for final determination."

The differentiation between suspension or expulsion for academic unfitness and suspension or expulsion for causes other than academic failure drawn in that guideline reflects the dichotomy in decisional law drawn along similar lines.

[1] As is recognized by our recent decision in *Matter of Olsson v. Board of Higher Educ.*, 49 N.Y.2d 408, 426 N.Y.S.2d 248, 402 N.E.2d 1150, and the cases cited therein, because matters involving academic standards generally rest upon the subjective judgment of professional educators, courts are reluctant to impose the strictures of traditional legal rules. Though such matters are subject to judicial scrutiny, the issue reviewed in such a case is whether the institution has acted in good faith or its action was arbitrary or irrational.

Suspension or expulsion for causes unrelated to academic achievement, however, involve determinations quite closely akin to the day-to-day work of the judiciary. Recognizing the present day importance of higher education to many, if not most, employment opportunities, the courts have, therefore, looked more closely at the actions of educational institutions in such matters.

The legal theory upon which review should be predicated in such cases is, how-

ever, not entirely clear. Plaintiff argues, and the dissenters in the Appellate Division agree, that the student-private college relationship is contractual and that it is an implied term of the contract that rules such as the Wagner College Guidelines will be adhered to by the college. There is support for that concept in decisional law (*Matter of Carr v. St. John's Univ., N.Y.*, 17 A.D.2d 632, 231 N.Y.S.2d 410, affd. 12 N.Y.2d 802, 235 N.Y.S.2d 834, 187 N.E.2d 18; *People ex rel. Cecil v. Bellevue Hosp. Med. Coll.*, 60 Hun. 107, 14 N.Y.S. 490, affd. 128 N.Y. 621, 28 N.E. 253; *Goldstein v. New York Univ.*, 76 App.Div. 80, 78 N.Y.S. 739; *Drucker v. New York Univ.*, 59 Misc.2d 789, 300 N.Y.S.2d 749) and in legal commentary as well (Beach, Fundamental Fairness in Search of a Legal Rationale in Private College Expulsions, 2 J.Coll. & Univ.L. 65, at pp. 65–70, 79–81; Center for Law & Education, The Constitutional Rights of Students: Analysis and Litigation Materials For The Student's Lawyer, pp. 371–372 [hereafter "Student's Lawyer"]; Note, 48 Ind.L.J. 253; Note, 37 Ohio State L.J. 605; Note, 72 Yale L.J. 1362).

Contract theory is not wholly satisfactory, however, because the essentially fictional nature of the contract results in its generally being assumed rather than proved, because of the difficulty of its application, and because it forecloses inquiry into, and a balancing of, the countervailing interests of the student on the one hand and the institution on the other (see *Matter of Ryan v. Hofstra Univ.*, 67 Misc.2d 651, 659, 324 N.Y.S.2d 964; "Student's Lawyer", at p. 372; Abrams & Hofman, Common Law Rights for Private University Students: Beyond the State Action Principle, 84 Yale L.J. 120, 122, 143–144 [hereafter "Common Law Rights"]; Rabban, Judicial Review of the University-Student Relationship: Expulsion and Governance, 26 Stan.L.Rev. 95, 97, 104–106 [hereafter "Judicial Review"]). An added problem is that when urged in academic achievement as distinct from nonacademic matters the contract tends to be limited to the implied in law condition of good faith, i. e., not to act arbitrarily (cf. *Matter of Olsson v. Board of Higher Educ.*, *supra*) to the ultimate confusion of the rules applicable in the two situations.

An alternate basis for review of nonacademic disputes between students and private colleges, the application of the principles of the law of associations, is supported by case law in some other States (*Baltimore Univ. v. Colton*, 98 Md. 623, 57 A. 14; *Abbariao v. Hamline Univ. School of Law*, Minn., 258 N.W.2d 108, 112; *Commonwealth ex rel. Hill v. McCauley*, 3 Pa. County Ct. 77; see *Student Bar Assn. v. Byrd*, 293 N.C. 594, 239 S.E.2d 415; *Blatt v. University of So. Cal.*, 5 Cal.App.3d 935, 85 Cal.Rptr. 601) as well as by legal commentators (Chafee, Internal Affairs of Associations Not for Profit, 43 Harv.L.Rev. 993, 996, 1013–1014, 1026, 1028–1029; Developments in the Law—Judicial Control of Actions of Private Associations, 76 Harv.L.Rev. 983, 989, 1011, 1014, 1032 [hereafter "Developments"]; "Student's Lawyer", at pp. 373–374; "Common Law Rights", at pp. 140–150; "Judicial Review", at pp. 112–117, 119–129).

The law of associations accords judicial relief to an association member suspended or expelled without adherence to its rules (Chafee, *op. cit.*, at pp. 1014, 1018–1020; "Developments", at pp. 995, 1021; 14 C.J.S. 1288–1289, Clubs, § 17; 6 Am.Jur.2d 465–468, Associations & Clubs, §§ 36, 37). The courts of this State have consistently recognized the right to such relief (*Browne v. Hibbets*, 290 N.Y. 459, 49 N.E.2d 713; *Polin v. Kaplan*, 257 N.Y. 277, 177 N.E. 833; *Simons v. Berry*, 240 N.Y. 463, 148 N.E. 636; *People ex rel. Deverell v. Musical Mut. Protective Union*, 118 N.Y. 101, 23 N.E. 129; *People ex rel. Meads v. McDonough*, 8 App.Div. 591, 35 N.Y.S. 214; *Loubat v. Le Roy*, 40 Hun. 546).

The parallel between associations and universities is, of course, not exact since students do not participate in the governance of a university with the same voice as generally do members in the functioning of an association (cf. "Common Law Rights", at pp. 144–145). The situation is further confused by the facts that at least in part the association law under discussion is stat-

ed in terms of contract (*Browne v. Hibbets*, *supra*, 290 N.Y. at p. 466, 49 N.E.2d 713; *Polin v. Kaplan*, *supra*, 257 N.Y. at p. 282, 177 N.E. 833), and that in several cases the obligation to follow its own rules has been applied to a private university without reference to contract law (*Matter of Kwiatkowski v. Ithaca Coll.*, 82 Misc.2d 43, 48, 368 N.Y.S.2d 973; *Matter of Ryan v. Hofstra Univ.*, 67 Misc.2d 651, 660–661, 324 N.Y.S.2d 964, *supra*; see *Matter of Olsson v. Board of Higher Educ.*, 66 A.D.2d 196, 198, 412 N.Y.S.2d 615, rev. on other grounds 49 N.Y.2d 408, 426 N.Y.S.2d 248, 402 N.E.2d 1150, *supra*; *Matter of Sofair v. State Univ. of N.Y. Upstate Med. Center Coll. of Medicine*, 54 A.D.2d 287, 292, 388 N.Y.S.2d 453, rev. on other grounds 44 N.Y.2d 475, 377 N.Y.S.2d 780, 406 N.Y.S.2d 276).

[2] We do not find it necessary in the present case to resolve such problems as may arise out of the different theoretical predicates. Whether by analogy to the law of associations, on the basis of a supposed contract between university and student, or simply as a matter of essential fairness in the somewhat one-sided relationship between the institution and the individual, we hold that when a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed.

We are brought then to a consideration of the guideline in question in relation to the suspension of Nancy Tedeschi. Had her suspension been solely for unsatisfactory progress in her studies, the guideline would have imposed no further obligation on the college and the only judicially reviewable question would have been whether it had acted in good faith (*Matter of Olsson v. Board of Higher Educ.*, *supra*). Moreover, there was substantial compliance with so much of the guideline as required that Nancy's parent be notified that Nancy was considered unfit for a cause other than academic, since Dr. Wendel sought to arrange a meeting between Mrs. Tedeschi and college officials to discuss Nancy's problems.

The guideline permits either the dean of students or the dean of academic affairs to expel or suspend a student. The withdrawal letter forwarded on January 18, 1977 by the dean of students was, therefore, in conformance with its provisions. But the guideline does not stop there. It requires a further hearing by the Student-Faculty Hearing Board and review of that board's findings by the president of the college in any case in which suspension is for a cause other than academic failure and the student has not had a hearing before an established college court.

Dr. Guttu testified that the college court normally dealt with civil disorders or complaints by one student against another, but that cannot avail the college for it is undisputed that no court or board of any kind ever considered Nancy's case. As to the cause for Nancy's suspension, the Appellate Division found that it was based on her irrational and disruptive conduct. It, thus, apparently tacitly overruled the Trial Judge's reference to academic standing as a cause, but even if it did not, the further proceedings required by the guideline would still be mandated. This is because a suspension for both academic and other causes is necessarily, at least in part, a suspension for a cause other than academic failure. That is not to say that the board would have the right, not given it by the guideline, to review Nancy's scholastic standing as a ground for suspension, but simply to require that she have what the guideline accords her: review of the cause other than academic failure that it involved.

The college argues that Nancy's informal meetings with the two deans and the president's assistant was sufficient compliance with the guideline. Though those meetings may have been sensitive and fair, as the Trial Judge indicated, it constituted no acceptable substitute for a hearing board composed of both students and faculty. The college also suggests that the refusal of Mrs. Tedeschi to meet with its officials constituted a waiver of Nancy's hearing rights, but the guideline itself refutes that, since the purpose of such a meeting is simply to give the parent the possibility of avoiding

embarrassment by withdrawing the student. Nor can we accept the suggestion that plaintiff was obliged to make a formal demand for a hearing before the Student-Faculty Hearing Board. Not only is the guideline phrased in mandatory terms ("shall have the right to be heard") but also it was the obligation of the college in effecting the suspension to call plaintiff's attention to the further procedures provided for by the guidelines (*Loubat v. Le Roy*, 40 Hun. 546, 552, 556 *supra*). Even were that not so, plaintiff's complaint which specifically noted that she had never had a hearing would constitute a sufficient demand (see *Fried v. Straussman*, 41 N.Y.2d 376, 380, 393 N.Y.S.2d 334, 361 N.E.2d 984).

[3] Under the guideline plaintiff was properly suspended but was entitled to review of her suspension by the hearing board and the president. So much of the complaint as sought money damages and the right to a due process hearing based on claimed "state action" was properly dismissed, but she was entitled to judgment directing review by that body and that official as the guidelines require.

A few words with respect to the dissent are in order. What the guideline contemplates, and what this opinion holds that it requires (*supra*, pp. 1306, 1307) is review, by the Student-Faculty Hearing Board and by the president, of the nonacademic cause for Ms. Tedeschi's suspension. The apparent purpose of that review is the different viewpoint that may be taken by a hearing board composed of faculty and students than will be taken by a dean, whether the dean of students or the dean of admissions.* No reason, other than the possible burden on the college in holding such a hearing, is suggested by the dissent for denying her that right.

The crux of the dissent is contained in its references (p. 1309) to elevating "formal legalistic principles over the dictates of ordinary common sense" and to "a mechanistic approach to the law". As Mr. Justice Felix Frankfurter wrote almost 40 years ago in *McNabb v. United States*, 318 U.S. 332, 347, 63 S.Ct. 608, 616, 87 L.Ed. 819, "The history of liberty has largely been the history of observance of procedural safeguards." If that be true in the dealings of the State with citizens enmeshed with its criminal justice system it is no less true in the dealings of a college with the members of its student body. To suggest, as does the dissent, that the college can avoid its own rules whenever its administrative officials in their wisdom see fit to offer what they consider as a suitable substitute is to reduce the guidelines to a meaningless mouthing of words. We do not countenance that in other relationships nor should we between student and college.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the case remitted to Supreme Court, Richmond County, with directions to enter judgment reinstating plaintiff as a student for the September, 1980 term of the college, unless prior to the opening of that term she has been accorded a hearing by the Student-Faculty Hearing Board.

GABRIELLI, Judge (dissenting).

More than three and one-half years ago, Nancy Jean Tedeschi, a part-time, nonmatriculated student, was forced to withdraw from classes at Wagner College due to her disruptive and sometimes threatening conduct in and out of the classroom. Today, a majority of this court, after reviewing the extensive evidence that was offered at trial, has nevertheless directed that the college conduct a formal hearing, presumably for the purpose of determining the correctness and wisdom of its original decision. Since I am persuaded that such a hearing could be nothing more than a painful exercise in futility given the peculiar circumstances in this case, I am compelled to dissent.

* "[E]ven if the facts are undisputed and the determinative issue is whether the student's actions warrant his expulsion under existing policy or rules, the student should have some opportunity to justify his behavior so that the decision making tribunal has available the arguments of both sides and can form a balanced judgment" (Developments In The Law—Academic Freedom, 81 Harv.L.Rev. 1045, 1138-1139).

Preliminarily, it must be noted that the Trial Judge in this case found the testimony of the school officials regarding Ms. Tedeschi's disruptive and irrational behavior to be "extremely credible" (93 Misc.2d, 510 at p. 514, 402 N.Y.S.2d 967). Also credited were the statements made by the school authorities concerning their unsuccessful efforts to resolve this delicate matter privately through informal conferences. Inasmuch as the Appellate Division affirmed without making new findings of fact, we must accept these findings as true for purposes of the present appeal (CPLR 5501, subd [b]; Cohen and Karger, Powers of the New York Court of Appeals, pp. 476–480).

The statements of the school authorities, taken together, paint a portrait of a distraught, emotionally disturbed young woman who seemed incapable of controlling her own feelings of aggression and was equally incapable of fulfilling her responsibilities as a student in an institution of higher learning. Ms. Tedeschi habitually disrupted her Latin class throughout her first semester at the college and, indeed, failed to complete two of the three courses in which she was enrolled. The rapid deterioration of her emotional state culminated in a series of harassing telephone calls and suicide threats which, understandably, alarmed the authorities at the school. Under the circumstances, it cannot be said that the college officials reacted in an arbitrary or unfair manner. To the contrary, in attempting to bring Ms. Tedeschi and her mother in for an informal interview to discuss the student's academic and emotional difficulties, the school officials obviously were hoping to reach a solution which would spare this unfortunate young woman further unnecessary embarrassment. That this is so is reflected in the college's final letter to Ms. Tedeschi, which stated that she was being asked to withdraw from classes, but indicated that she was free to apply for readmission if and when she straightened out her emotional difficulties. I cannot imagine a fairer resolution of the immediate problem, particularly in view of Ms. Tedeschi's continued inability to discuss the concerns of the school officials in a calm and rational manner.

Yet, three and one-half years after the fact, a majority of this court concludes that the college is required to afford Ms. Tedeschi a hearing. What possible constructive purpose would be served by such a hearing we are not told. Ordinarily, a hearing serves the salutary purpose of permitting all sides to air their conflicting versions of events and bring forth all of the disputed facts. In the educational setting in particular, the United States Supreme Court has described the purpose of a disciplinary hearing as "an effort to inform [the student] of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done" (*Goss v. Lopez*, 419 U.S. 565, 580, 95 S.Ct. 729, 739, 42 L.Ed.2d 725). Furthermore, "requiring [an] informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect" (*id.*, at pp. 583–584, 95 S.Ct. at p. 741). In the case of Ms. Tedeschi, however, there was never any reason to believe that the student had an alternate version of the facts to present to a neutral hearing body. To the contrary, the evidence accepted by the trial court demonstrates that Ms. Tedeschi and her mother had repeatedly rebuffed efforts by the school authorities to elicit their side of the story. When Ms. Tedeschi finally did come in to speak with the academic dean and the other school officials, she was unable to provide a rational or coherent explanation for her conduct. Significantly, according to the testimony that was credited by the Trial Judge, Ms. Tedeschi never requested an opportunity to have her case heard by a neutral hearing body, although she did speak to school officials personally on at least two occasions.[1] Indeed, every-

1. Ms. Tedeschi's mother testified that she had telephoned the college and requested a hearing for her daughter. Later in her testimony, however, the student's mother admitted "I didn't say hearing but I said I would like to come with Nancy and see what is happening in the

thing about the behavior of Ms. Tedeschi and her parent indicated that they had no interest in presenting their case to college officials.[1]

It has been argued that the school had an affirmative obligation to notify Ms. Tedeschi of her right to a hearing before the Student-Faculty Hearing Board pursuant to the college's regulations. Although the regulation relied upon by the majority states that the dean of students "may notify parents or guardians in order that they may have an opportunity to withdraw the student" when the student is "deemed to be an unfit member of the College", however, there is nothing in the regulation that suggests that the school has an affirmative obligation to give the student formal notice of his right to a hearing prior to his suspension from classes. In any event, the special facts presented by Ms. Tedeschi's case cannot be ignored. In view of her continued inability to conduct herself in a rational manner, it cannot be said that a hearing before a student-faculty board would have been an appropriate or effective safeguard of her interests. Inasmuch as the facts concerning her behavior were not seriously disputed, I cannot conclude that the school authorities acted unreasonably or unfairly because they did not think to invite Ms. Tedeschi to present her case to a hearing board.

Nevertheless, the majority, without definitively adopting any particular theory, now holds that the college was bound to follow its internal regulations and provide Ms. Tedeschi with a hearing even in the absence of a request for an opportunity to present her case. Presumably, it has done so in order to vindicate the general principle that once a university establishes and publishes a rule outlining the procedures to be followed in disciplinary matters, it must invariably adhere to that rule. There can be no disagreement with this concept as a general principle of law. In a case such as this, however, our application of such general principles must be tempered by our understanding of the somewhat unusual facts. Ms. Tedeschi was suffering from an emotional breakdown at the time in question. Her suspension from classes for the spring semester was not a "disciplinary" measure in the traditional sense, but rather was a recognition by the school officials that her continued attendance would be fruitless from an academic standpoint. Given these facts, to require that the college adhere to its published procedures regarding student discipline would be to elevate formal legalistic principles over the dictates of ordinary common sense. I cannot concur with such a mechanistic approach to the law.

In the recent case of *Matter of Olsson v. Board of Higher Educ.*, 49 N.Y.2d 408, 426 N.Y.S.2d 248, 402 N.E.2d 1150, this court stated that college officials must be accorded wide latitude in evaluating the academic progress of their students (cf. *Board of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124). In an effort to overcome the rationale in *Olsson* as well as the college's own rule permitting academic dismissals without a prior hearing, the majority asserts that the decision to dismiss Ms. Tedeschi was not rooted in academic concerns. The arguments advanced by the majority in connection with this assertion are not convincing. First, the majority erroneously states that the Appellate Division's finding that the dismissal was based upon Ms. Tedeschi's "irrational and disruptive conduct" somehow "tacitly overruled" the Trial Judge's conclusion that the

school". This belated request for a conference was made only after the school sent the final suspension letter to Ms. Tedeschi. Inasmuch as the mother had previously repulsed the efforts of school administrators to resolve the matter in a private interview, she must be deemed to have waived by her conduct any right she may have had to present arguments in opposition to her daughter's suspension to the school authorities.

2. The majority states that Ms. Tedeschi's complaint in the instant action constituted a "sufficient demand" for a hearing. I fail to see, however, how a complaint served months after the dismissal can be regarded retroactively as a substitute for a timely notification to the college that Ms. Tedeschi wished to be heard.

dismissal was grounded in academic reasons. Next, the majority reasons that, even if this is not the case, a hearing still should have been required because the school officials were motivated, at least in part, by reasons unrelated to Ms. Tedeschi's academic failure. I find, however, that the majority's attempts to parse out a distinction between dismissal for academic failure and dismissal for "other reasons" are, in this case, unavailing, since, in any event, Ms. Tedeschi was plainly suspended because of her inability to function in the academic setting. Given the student's failure to make satisfactory progress in her studies as well as her repeatedly disruptive behavior in class, it cannot be said that the authorities at Wagner College were not acting in the proper exercise of their academic discretion when they made the decision to suspend Ms. Tedeschi without a prior hearing. Indeed, even the majority acknowledges that Ms. Tedeschi was terminated, at least in part, as a result of her academic performance. Accordingly, she was not entitled to a hearing under the regulations promulgated by the college.

In closing, I would note that the form of relief ordered by the majority serves only to highlight the problems inherent in its approach to this case. The majority has held that Wagner College must either *reinstate* Ms. Tedeschi or hold a belated formal inquiry into the facts surrounding her dismissal. I cannot perceive, however, what possible purpose could be served by such a hearing at this point, particularly since three separate courts have already reviewed the facts underlying the dismissal. If Ms. Tedeschi has recovered from her emotional difficulties in the three and one-half years since she attended class at Wagner College, there presumably would be no obstacle to her applying for readmission. If, on the other hand, she has not yet managed to bring her problem under control, a ritualistic hearing regarding events long past will not advance her interests.

For all these reasons, I respectfully dissent and cast my vote in favor of affirming the decision of the Appellate Division.

JONES, WACHTLER and FUCHSBERG, JJ., concur with MEYER, J.

GABRIELLI, J., dissents and votes to affirm in a separate opinion in which COOKE, C. J., and JASEN, J., concur.

Order reversed, with costs, and the case remitted to Supreme Court, Richmond County, with directions to enter judgment in accordance with the opinion herein.

49 N.Y.2d 668

The PEOPLE of the State of New York, Respondent,

v.

Victor CASASSA, Appellant.

Court of Appeals of New York.

April 1, 1980.

Defendant was convicted in the County Court, Nassau County, Raymond Harrington, J., of murder in the second degree and he appealed. The Supreme Court, Appellate Division, 66 A.D.2d 1032, 411 N.Y.S.2d 478, affirmed. The Court of Appeals, Jasen, J., held that: (1) not all mental infirmities which do not arise to the level of insanity constitute extreme emotional disturbance, (2) determination of whether there was a reasonable explanation or excuse for a particular emotional disturbance should be made by viewing the subjective situation in which defendant found himself and the external circumstances as he perceived them at the time and assessing from that standpoint whether the explanation or excuse for his emotional disturbance is reasonable; (3) trier of fact is never required to find mitigation on any particular set of facts, (4) trial court did not abuse its discretion in failing to find extreme emotional disturbance in the instant case; (5) sta

found in it. Perhaps plaintiff's self-concern blinds her to the fact that the penalty imposed on her, as a leader of the University community, has to have some educative effect on other student members of the community. In addition, to paraphrase the poet, "the child is mother to the woman," we believe that the lesson to be learned here should be learned by Gabrielle Napolitano and borne by her for the rest of her life. We are sure it will strengthen her in her resolve to become a success in whatever endeavor she chooses.

The judgment of the Chancery Division is affirmed, with no costs to any party.

186 N.J.Super. 576

Gabrielle NAPOLITANO, Plaintiff,

v.

The TRUSTEES OF PRINCETON UNIVERSITY, William G. Bowen, individually and as President of Princeton University, Peter Onek, individually and as Assistant Dean of Student Affairs of Princeton University, and Sylvia Molloy, Defendants.

Superior Court of New Jersey, Chancery Division, Mercer County

Decided from bench June 2, 1982

Supplemented June 30, 1982

University student brought action to compel the institution to issue her a Bachelor of Arts degree at its regular June commencement exercise. The Superior Court, Chancery Division, Mercer County, Dreier, J. S. C., held that: (1) evidence supported findings of plagiarism, and (2) although plaintiff had an otherwise unblemished academic record and although other alternatives were available, it was for the university to choose to withhold plaintiff's degree for one year.

Complaint dismissed.

Judgment affirmed, 455 A.2d 263.

1. Colleges and Universities ⇐9

Although if it believed student's claim that she knew that professor was familiar with work from which she quoted without attribution in term paper and that because of her lack of proficiency in Spanish, the quotations, which were in Spanish, would immediately be recognized, disciplinary committee might have found that offense was merely an unintentional academic infraction, the evidence was sufficient to uphold finding of plagiarism, defined as deliberate use of any outside source without proper acknowledgment, and under doctrine of judicial abstention the court would not disturb that finding.

2. Colleges and Universities ⇐9

In a student discipline case a court may not substitute its own views for those of a duly competent administrative body within a private college or university and court may not act as governmental overseer except where judicially cognizable issues call for its intervention to protect the rights of an individual or the public.

3. Colleges and Universities ⇐9

In determining whether discipline imposed on university student for alleged plagiarism violated contract to award a Bachelor of Arts degree if student complied with university rules and regulations the legal standard against which to measure university's conduct was that of good faith and fair-dealing.

4. Colleges and Universities ⇐9

A court should not engraft its own views on a private university's student disciplinary process so long as the standard of good faith and fair-dealing has been met and the contract between the state and the university has otherwise been breached.

5. Colleges and Universities ⇐9

University did not act in bad faith in withholding plaintiff's Bachelor of Arts degree for one year because of infraction of university regulations relating to academic

fraud, namely, plagiarism, notwithstanding plaintiff's otherwise exemplary performance and otherwise unblemished record or fact that there existed other alternative forms of punishment.

6. Injunction ⇐22

Request for injunction against private university's giving notice of its plagiarism adjudication to any law school to which plaintiff student had applied was moot as notariety derived from action challenging withholding of Bachelor of Arts degree for one year marked plaintiff's record more permanently than anything the institution might place on her transcript.

Nathan M. Edelstein, Newark, for plaintiff (Brener, Wallack & Hill, Princeton, attorneys).

William J. Brennan, III, Princeton, for defendants (Smith, Stratton, Wise, Heher & Brennan, Princeton, attorneys).

DREIER, J. S. C.

Plaintiff instituted this action to compel defendant Princeton University to issue her Bachelor of Arts degree at its regular June commencement exercises, and for other incidental relief. Defendant maintained that as a result of a decision of its Committee on Discipline, which was confirmed by the university president, plaintiff's degree was to be withheld for the period of one year as penalty for her infraction of the university's regulations relating to academic fraud. The university contends that plaintiff plagiarized the bulk of a 12-page term paper, written in Spanish, and submitted in Spanish 341 (The Spanish American Novel) as a critical review of *Cien anos de Soledad* (100 years of Solitude) by Gabriel Garcia Marquez. Plaintiff, a student with a previously spotless record and a 3.7 cumulative grade point average, admitted the presence in her term paper of long passages quoted without attribution from *Cien anos de Soledad: una interpretation*, by Josefina Ludmer ("Ludmer"), but claimed that this did not constitute plagiarism within the definition of that offense in the Princeton handbook, "Rights, Rules and Responsibilities" (1980).

By way of defense before the Committee on Discipline, the university president, Dr. Bowen, as well as this court, plaintiff explained that she had cited the Ludmer source five times in footnotes and once in the text, but had failed to use quotation marks or other textual or footnote citations for the bulk of the disputed material, determining the same to have been unnecessary. She noted that the Ludmer book had been placed on reserve for her by her Spanish professor, who had suggested she use that source as the basis for her paper; therefore, she knew that the professor was familiar with the volume in question. Plaintiff explained that she speaks and writes only halting Spanish, and had taken the course, not because she needed the credits for her degree (she was an English major), but merely to become more familiar with Spanish literature. She expected that her extensive quotations from Ludmer would immediately be recognized, since the grammatical structure and flowing style were clearly beyond her capability in written Spanish. Plaintiff admitted that she produced a poor paper and perhaps deserved to fail the particular assignment, but steadfastly maintained that she had no intent to deceive her professor—she merely failed to follow the prescribed rules as to the use of quotation marks or other attribution references.

The student handbook recites that the usual penalty for academic fraud is "one year's suspension or required withdrawal from the University." This court has reviewed many of the disciplinary files (after requesting the deletion of the students' names to preserve anonymity), and has found that the actual penalties ranged from 20 days disciplinary probation (until graduation, for an offense that was adjudicated at the end of a student's senior year) to explusion (for the submission of a paper wholly plagiarized from an obscure source). Far from being uniform, the penalties appeared to be imposed on an *ad hoc* basis, with suspension (or the withholding of the degree for seniors) being the exception rather than the rule.

The case was first presented to this court as an emergent matter because of the proximity of graduation, which was scheduled for June 8, 1982. Initially, the court requested that the attorneys go back to their clients and try to resolve the case without the necessity of adjudication, and with due recognition of the university's own practices and plaintiff's theretofore exemplary record. When the case was reported back as not subject to settlement, the court ordered accelerated depositions and prepared to process the matter on an expedited basis, scheduling the first formal hearing for the last week in May.

At this hearing the court considered the procedures followed by the university in dealing with plaintiff's alleged offense—specifically, did the university comply with its own rules and regulations? At issue initially was the definition of plagiarism. The university had applied a definition which held as irrelevant the student's intent (or lack thereof) to deceive the reader. Plaintiff urged that the history of the handbook definition demonstrated that intent was not only relevant but central to the concept of plagiarism. In the 1978 edition of "Rights, Rules and Responsibilities" there had been an exception under "defenses" stating that the absence of intent was not a defense, and the word "deliberate" was not included in the basic definition of plagiarism. In the 1980 edition the "absence of intent" phraseology was deleted and a new definition of plagiarism was added:

> PLAGIARISM. The *deliberate* use of any outside source without proper acknowledgement. "Outside source" means any work, published or unpublished, by any person other than the student. [Emphasis supplied].

The second procedural issue related to the ability of plaintiff to present both fact and character witnesses in her own behalf. She had been permitted to call any fact witness but the university had limited character witnesses to those from the Princeton University community whose names appeared in the Centrex directory. The handbook, however, provided that "the student has an opportunity to present his or her case and *any* witnesses desired for his or her defense" (Emphasis supplied). Plaintiff had sought but was denied permission to present character witnesses who no longer were members of the Princeton community but were familiar with plaintiff's character.

Next, plaintiff claimed that she had not been told that she had the right to cross-examine any witnesses who would appear against her. She claimed that, although she had been told by an Assistant Dean that she could present her own case, he neglected to inform her that she had a right of cross-examination, as provided in the student handbook.

As her last procedural claim, plaintiff contended that she had been denied the right to counsel before the committee. Here, she acknowledged that the university followed its own regulations, but asserted that these were unconstitutional insofar as they limited plaintiff to an advisor (who may or may not be an attorney) from within the university community, but did not permit the appearance of outside counsel. The result of these infractions, she claimed, was an unwarranted determination of guilt, and an excessive penalty, considering the nature of the offense, her own record and penalties imposed in similar cases.

This court remanded the matter to the Committee on Discipline for a rehearing to be held during the first week in June, but retained jurisdiction to review the action of the committee during the same week. The committee was directed to apply the 1980 definition of plagiarism, this court noting specifically that the use of the word "deliberate," and the removal of the "absence of intent" language dictated that the proscribed plagiarism must have been with the intent to pass off the submitted work as the student's own. In addition, the committee was directed to permit plaintiff to call *any* witnesses she wished on her own behalf, subject only to reasonable regulation by the presiding officer (under rules similar to *Rule* 4 of the *New Jersey Rules of Evidence*), and that she be afforded the right

to cross-examine any witnesses presented against her.

As to the right to counsel, this court reviewed both the federal and state authorities submitted, especially the case of *Garrow v. Elizabeth Gen'l Hosp. & Dispensary*, 79 *N.J.* 549, 566–567, 401 *A.2d* 533 (1979), and balanced the several factors governing the right to counsel. Among these were the absence of counsel representing the complainant or university at the hearing, the university's practice of permitting the student to select an advisor from within the Princeton University community, the academic nature of the matter in dispute and the probable punishment that could reasonably attend a determination of plaintiff's guilt. In *Garrow* our Supreme Court permitted a physician to have his attorney present at a staff affiliation hearing. Princeton, however, is not a *quasi*-public institution as was the hospital in *Garrow*. The rights of the public to have a particular physician on a hospital staff, and the substantial potential property rights of the physician himself, apparently tipped the balance in *Garrow* in favor of the right to counsel. The academic hearing in the present case was of a different nature.[1] Were the court to enforce a right to counsel in such a situation, the academic community's control over its own affairs would be unjustifiably limited. This court recognizes, however, that there may be academic areas where the right to counsel might properly be mandated. In *Rodriguez v. Rosenblatt*, 58 *N.J.* 281, 277 *A.2d* 216 (1971), counsel was required even in municipal court, in cases where an indigent defendant is faced with an actual threat or likelihood on conviction of "imprisonment in fact or other consequence of magnitude" (at 295, 277 *A.2d* 216). However, given the history of penalties actually rendered in plagiarism cases where there had been no "palming off" of an obscure source as the student's own work, there was little likelihood that the hearing would have resulted in plaintiff's suffering any forfeiture, *i.e.*, expulsion, with the resultant loss of her four-year investment of time and money, or immediate suspension, with a similar loss of a semester's time and expenses. Whether in such forfeiture cases a sufficient right might exist was not before the court, and, therefore, this court expresses no opinion on the right to counsel in academic forfeiture situations.

The committee held its rehearing pursuant to this court's direction and reaffirmed its original decision to withhold plaintiff's degree for one year. Plaintiff's appeal to President Bowen was similarly unavailing, and the matter was returned before this court for hearing on June 2, 1982.

[1] Two issues remain: first, was there sufficient evidence before the Committee on Discipline and President Bowen to justify the findings of plagiarism and, second, was the penalty appropriate? As to the first issue, it was unnecessary for the court to decide whether the standard of review was to be "some evidence" (see *Wood v. Strickland*, 420 *U.S.* 308, 95 *S.Ct.* 992, 43 *L.Ed.2d* 214 (1975)), "substantial evidence" (see *Slaughter v. Brigham Young Univ.*, 514 *F.2d* 622 (10 Cir. 1975), *Silver v. Pennsylvania State Univ.*, 318 *F.Supp.* 605 (M.D.Pa.1970), aff'd 462 *F.2d* 463 (3 Cir. 1972)), "sufficient reliable evidence" (see *Garrow*, *supra* 79 *N.J.* at 565, 401 *A.2d* 533), or "preponderence of the evidence" (generally used in civil trials). Whichever test might be used, there is no question, from plaintiff's extensive use of unattributed material, that the committee was justified in concluding that she committed the offense with the intention to pass off the quoted material as her own. Although the committee might well have found, if it believed plaintiff's claim, that the offense was merely an unintentional academic infraction (defined in the handbook as one which did not involve fraud), the evidence was sufficient, when measured against any of the above quoted standards, to uphold the decision of the Committee on

1. *Cf.* the practice followed in prison discipline cases of allowing another inmate to serve as advisor to a prisoner appearing at a disciplinary hearing. *N.J. State Parole Bd. v. Woupes*, 184 *N.J.Super.* 533, 535, 446 *A.2d* 1214 (App.Div.1982).

Discipline. Thus this court, as a court of review, will apply the doctrine of judicial abstention and refuses to disturb the findings of the committee.

[2] As to the issue of the penalty, a harder problem is presented. A court may not substitute its own views for those of a duly constituted administrative body within a private institution. It may not act as a governmental overseer, except where judicially cognizable issues call for its intervention to protect the rights of an individual or the public.

[3] Here we have a breach of contract issue: Whether the assessment of the penalty violates Princeton's agreement to award the Bachelor's degree if plaintiff complied with the university's rules and regulations. *See Clayton v. Princeton Univ.*, 519 *F.Supp.* 802 (D.N.J.1981). This court must determine whether this contract between plaintiff and defendant has been breached by the severity of the penalty assessed. However, in matters of interpreting and enforcing the contract between the parties, the university has broad discretion—a discretion to which plaintiff submitted herself when she enrolled at Princeton. In determining whether there has been a breach of contract, the legal standard against which the court must measure the university's conduct is that of good faith and fair dealing, for, as noted by our Supreme Court in *Onderdonk v. Presbyterian Homes of N.J.*, 85 *N.J.* 171, 182, 425 *A.2d* 1057 (1981): "[i]n every contract there is an implied covenant of good faith and fair dealing."

[4] As this court has noted in prior hearings and conferences, Princeton might have viewed the matter of the penalty with a greater measure of humanity and magnanimity, with a greater recognition of the human frailities of students under stress, as the university apparently has done in many cases in the past.[2] This court cannot mandate compassion, however, and will not, nor should not, engraft its own views on Princeton's disciplinary processes, so long as the standard of good faith and fair dealing has been met and the contract between the student and the university has not otherwise been breached. *Accord, Wood v. Strickland, supra*, and *Higgins v. American Society of Clinical Pathologists*, 51 *N.J.* 191, 202, 238 *A.2d* 665 (1968). Private institutions must remain free of inordinate government—in this case judicial—control.

Plaintiff has argued that the penalty assessed was excessive in view of three factors: first, her exemplary performance at Princeton in all spheres of university life, and the spotless record she had established up until and since this single episode[3], second, the nature of the alleged plagiarism itself, and her defense of lack of intent; and third, the history of the past treatment of students with similar offenses and backgrounds. She points out with particularity the many cases in which disciplinary probation had been given for similar offenses with students having far worse academic and disciplinary records than hers, and notes that even if the degree were to be withheld, a four-month withholding period was more usual than the one-year penalty imposed in her case. Against these arguments, Princeton urges that withholding plaintiff's degree for one year is not an excessive penalty since this was a grievous

2. This observation is based on the court's detailed examination, as noted earlier, of over 20 disciplinary files, as well as its review of a table of some 78 cases of academic fraud (mainly plagiarism) and the penalties imposed therefor at Princeton over the past four years.

3. Apart from the infraction that is the subject of this case, plaintiff's record has been spotless, both academically and in extra-curricular areas. An athlete, plaintiff had been injured in her freshman year and therefore could not continue as a participant in the sports programs. She immediately took on responsibilities as team manager, and in many other areas devoted herself selflessly to Princeton, earning recognition from students, professors, the athletic department and others in the Princeton community. Recommendations presented to the Committee on Discipline were filled with superlatives describing her character, academic achievements and devotion to Princeton. One professor noted her to be the single finest student with whom he had become acquainted during his tenure at the university.

case of plagiarism, namely, extensive use of unattributed material with an intent to deceive. Furthermore, this punishment is less onerous than that stated as usual (though in actuality rarely imposed) in the university's regulations—suspension for one year or required withdrawal from the university. In addition Princeton points to several precedents for the penalty assessed here, and urges that there is no requirement that punishment be uniform in matters of discipline within a private academic institution. Lastly, Princeton contends that it is permitted to take such action to uphold its academic integrity as one of the world's leading institutions of higher learning.

[5, 6] However this court personally may view the penalty imposed,[4] the proper role of a court is to permit private organizations to govern their own affairs, unless the court's intrusion is warranted by conduct so egregious as to constitute a breach of the parties' agreement. To upset Princeton's decision here, this court would have to find that Princeton could not in good faith have assessed the penalties it did against plaintiff. This court cannot do so, in view of its understanding of the proper role of a court—even a court of equity. Judicial restraint is called for, and therefore, this court will not modify the penalty imposed by Princeton.[5]

Summary judgment is hereby granted dismissing the complaint.

4. The court notes that there were alternative punishments available. Disciplinary probation was the usual penalty in most plagiarism cases, even for seniors. However, if Princeton found plaintiff's offense to be particularly grievous, thus meriting a greater penalty than disciplinary probation, the university could have withheld plaintiff's degree until just after her class had graduated, thus preventing her from attending the graduation ceremonies, or until September, which still would have permitted her to start graduate school in the fall. Although plaintiff still retains the right to her Princeton degree, which will be awarded in June 1983, she has lost a year of academic life, but as noted earlier there is no forfeiture of her investment in her degree since she was neither expelled nor suspended.

5. Plaintiff had sought as additional relief an injunction against Princeton's giving notice of its plagiarism adjudication to any law school to which plaintiff had applied. The notoriety deriving from this case, however, marks plaintiff's record more permanently than anything that defendant might place upon her transcript. Therefore, her argument that there should be no such notification or notation is moot at this point.

186 N.J.Super. 587

Anthony J. BARILE and Sylvia J. Barile, his wife; George E. Klima and Valerie Klima, his wife; and Frank Creveling and Anne R. Creveling, his wife, Plaintiffs,

v.

CITY OF PORT REPUBLIC, a municipal corporation of Atlantic County, New Jersey, Defendant.

Superior Court of New Jersey, Law Division, Atlantic County.

Sept. 17, 1982.

Married couples owning lands and buildings which fronted on roads alleged to be public brought prerogative writ action, challenging failure to include such roads on official map adopted by municipality's governing body. The Superior Court, Law Division, Atlantic County, Edward S. Miller, J.S.C., held that (1) adoption of city's official map was inoperative with respect to existing roads and streets in municipality, (2) proofs as to two of three roads involved in litigation fell short of establishing both dedication and acceptance as public road and therefore they would be declared private roads, but (3) third road, which proofs revealed had been in use probably since colonial times and had been periodically improved by municipality, would be declared public road, to be shown as such on official map.

Judgment accordingly.

383 Mass. 16

Leo J. COVENEY et al.

v.

PRESIDENT & TRUSTEES OF the COLLEGE OF the HOLY CROSS.

Supreme Judicial Court of Massachusetts, Norfolk.

Argued Oct. 8, 1982.

Decided Jan. 19, 1983.

Action was instituted by student against president and trustees of college for damages and specific performance by reason of alleged wrongful expulsion. The Superior Court, Norfolk County, Morse, J., granted college's motion for summary judgment, and student appealed. The Supreme Judicial Court, Hennessey, C.J., held that: (1) college did not act in bad faith or in an arbitrary or capricious manner when it determined to expel student given undisputed fact that student entered the dormitory of female students without their permission in clear violation of rules and regulations of any college, and (2) conduct of student when, in consideration for a hearing before president of college with respect to his expulsion, student agreed to dismiss his action against college for alleged wrongful expulsion and to execute a release holding college harmless from any liability for future disciplinary actions operated as a waiver of all claims thereafter asserted by student against the college.

Affirmed.

1. Judgment ⇐185(2)

A trial court ruling on a defendant's motion for summary judgment properly assumes that all of the facts set forth in the plaintiff's affidavits are true and that any inferences favorable to the plaintiff should be drawn.

2. Judgment ⇐185(4)

Any facts agreed to or established by a plaintiff in a deposition may be considered by the trial court on a defendant's motion for summary judgment in determining whether a genuine triable issue of material fact exists.

3. Colleges and Universities ⇐9

A private university, college, or school may not arbitrarily or capriciously dismiss a student.

4. Colleges and Universities ⇐9

If officials of a college or university act in good faith and on reasonable grounds, their decision to suspend or expel a student will not be subject to a successful challenge in the courts.

5. Colleges and Universities ⇐9

Violations of reasonable rules and regulations of a college or university are a recognized ground for dismissal of a student.

6. Colleges and Universities ⇐9

College did not act in bad faith or in an arbitrary or capricious manner when it determined to expel student; rules and regulations of college published in student handbook, a copy of which was received by student, were clearly breached when student entered the dormitory room of female students without their permission and thereafter held door to bar the entry of female students who were the rightful occupants of that room, and college provided student with two hearings and with opportunity to make statement.

7. Colleges and Universities ⇐9

A college must have broad discretion in determining appropriate sanctions for violations of its policies.

8. Colleges and Universities ⇐9

Mere comparisons between punishments imposed by a university or college on students are immaterial to issue whether a particular punishment imposed on particular student is arbitrary or capricious.

9. Release ⇐30

Conduct of student when, in consideration for a hearing before president of college with respect to his expulsion, student agreed to dismiss his action against college for alleged wrongful expulsion and to exe-

cute a release holding college harmless from any liability for future disciplinary actions operated as a waiver of all claims thereafter asserted by student against the college.

10. Colleges and Universities ⇐9

Where college was a private institution, student had no constitutional right to hearing with respect to expulsion. U.S.C.A. Const.Amend. 14.

11. Colleges and Universities ⇐9

Student expelled from private college did not have a contractual right to a hearing with respect to that expulsion based on a provision contained in student handbook that was in effect when he matriculated in college, where provision in effect at time of incident which led to student's expulsion was clear that there was no right to a hearing before expulsion from college.

12. Colleges and Universities ⇐9

A college is clearly entitled to modify its rules and regulations so as to properly exercise its educational responsibility.

13. Colleges and Universities ⇐9

Student had no constitutional right to have an attorney present at a hearing with respect to his expulsion from private college, and since presence of an attorney was not a condition of release signed by student, adequacy of hearing afforded by private college could not be challenged on ground that there was no attorney present.

14. Colleges and Universities ⇐9

Hearing afforded student by private college with respect to his expulsion was not invalid on ground that president of college was informed of events prior to hearing, nor did president's failure to actively question witnesses invalidate hearing.

15. Release ⇐18

Release signed by student at time of his expulsion from private college could not be voided on theory of duress in absence of a showing that conduct of officials of college caused student to enter into release under influence of such fear as precluded him from exercising free will and judgment.

George M. Herlihy, Boston, for plaintiffs.

William W. Hays, Worcester (Vincent F. O'Rourke, Jr., Worcester, with him), for defendants.

Before HENNESSEY, C.J., and WILKINS, LIACOS, NOLAN and O'CONNOR, JJ.

HENNESSEY, Chief Justice.

The plaintiffs, Leo J. Coveney and his son, Thomas R. Coveney (Coveney), commenced this action for damages and specific performance against the President and Trustees of the College of the Holy Cross (college) alleging that the college had wrongfully expelled Coveney during the last semester of his senior year.[1] A judge of the Superior Court granted the college's motion for summary judgment pursuant to Mass.R.Civ.P. 56, 365 Mass. 824 (1974). We granted the plaintiffs' application for direct appellate review. The plaintiffs argue on appeal that the judge erred in granting the college's motion for summary judgment because genuine issues of material fact exist. Specifically, the plaintiffs contend that triable issues of fact remain as to (1) whether the expulsion was arbitrary and capricious and (2) whether a release signed by Coveney is valid and precludes the present action. We disagree with the plaintiffs' contention that genuine issues of material fact are present in this case and, therefore, affirm the granting of summary judgment.

[1, 2] We point out that, in ruling upon the defendant's motion for summary judgment, the judge properly assumed that all of the facts set forth in the plaintiffs' affidavits were true and that any inferences favorable to the plaintiffs should be drawn. See *Community Nat'l Bank v. Dawes*, 369

1. It is unclear whether the father, Leo J. Coveney, has any claim independent of the rights of his son. He bases his claim on the fact that the tuition bills were addressed to him and that he paid them. Since the father does not assert, however, any rights different from those of his son, we treat the plaintiffs' claims alike.

Mass. 550, 553–556, 340 N.E.2d 877 (1976). We also note, however, that any facts agreed to or established by Coveney in his deposition also may be considered in determining whether a genuine triable issue of material fact exists. *Id.* at 556, 340 N.E.2d 877.

On March 29, 1980, Coveney, one Debs, and one Bagley, who were students at the college, attended a party in the basement of Alumni Hall, a dormitory on the campus of the college. Alcoholic beverages were served at the party and a female student, who was a friend or acquaintance of Debs, overindulged. Debs and Coveney were accompanying the female student back to her dormitory when she entered a women's lavatory in Alumni Hall and became ill. Some students took the intoxicated student to room 227 in Alumni Hall, a female students' dormitory room. Coveney and Debs later entered the room to check on the intoxicated female student's condition. When they entered the room, she was lying face down on the bed naked from the waist down. A short while later, Bagley entered the room. Other students attempted to enter the room but Coveney and Debs prevented the students from entering by holding the door closed. Bagley climbed out a window in the room and injured himself in a fall from the third story window. Shortly thereafter, Coveney and Debs opened the door, came out of room 227 and proceeded down the hallway to the stairway with their shirts pulled over their faces.

After meeting with Coveney, the dean of students offered Coveney the opportunity to withdraw voluntarily or to face expulsion. The dean stated that Coveney had violated college regulations which prohibited students from interfering with the rights of other students. Specifically, the dean stated that Coveney entered room 227 without the permission of the rightful occupants of the room, that the rightful occupants were forcibly prevented from entering the room, that after the door to the room was opened Coveney left the scene without giving any explanation of his presence in the room, and that Coveney has never provided an adequate explanation of his presence in the room. After Coveney refused to withdraw, the dean expelled him. Coveney then requested a hearing before the college judicial board and the request was denied.

Thomas Coveney filed suit in the Superior Court in Worcester County and obtained a temporary restraining order barring his expulsion. Coveney was then granted a further hearing before Father Brooks, the president of the college. In consideration for the hearing, Coveney agreed to dismiss the action in the Superior Court and to execute a release holding the college harmless from any liability for future disciplinary actions. Coveney signed the release after the hearing. The president of the college affirmed Coveney's expulsion. Coveney was the only one of the three students involved who was expelled from the college. Debs, a sophomore, withdrew from the college, while Bagley, a senior, was allowed to take his final examinations and to receive his degree in October, 1980, rather than at the regularly scheduled graduation ceremonies.

[3–5] We conclude that the judge correctly determined that there are no genuine issues as to any material fact and that the college is entitled to judgment as a matter of law. See *Community Nat'l Bank v. Dawes*, *supra* 369 Mass. at 553–556, 340 N.E.2d 877. We dispose of this case on the ground that the college did not violate any contractual or other rights of the plaintiffs by expelling Coveney, and on the additional ground that Coveney waived the claims he asserts here by executing a valid and binding general release. A private university, college, or school may not arbitrarily or capriciously dismiss a student. See *Robinson v. University of Miami*, 100 So.2d 442, 444 (Fla.Dist.Ct.App.1958); *Woods v. Simpson*, 146 Md. 547, 551, 126 A. 882 (1924); *Mitchell v. Long Island Univ.*, 62 Misc.2d 733, 735, 309 N.Y.S.2d 538 (N.Y.Sup.Ct.), aff'd., 35 A.D.2d 654, 314 N.Y.S.2d 328 (N.Y.1970); *Frank v. Marquette Univ.*, 209 Wis. 372, 377, 245 N.W. 125 (1932). Cf. *Hood v. Tabor Academy*, 296 Mass. 509, 510, 6 N.E.2d 818 (1937) (assuming without de-

ciding that school officials may not arbitrarily or capriciously dismiss a student). If school officials act in good faith and on reasonable grounds, however, their decision to suspend or expel a student will not be subject to successful challenge in the courts. See, e.g., *Frank v. Marquette Univ.*, *supra*; *Hood v. Tabor Academy*, *supra*. Violations of reasonable rules and regulations of a school are a recognized ground for dismissal of a student. See *id.*; *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir.1976).

[6] In this case the college did not act in bad faith or in an arbitrary or capricious manner when it determined to expel Coveney. The college stated that it was expelling him because of his breach of rules and regulations of the college which provide that interference with the rights of others is a ground for expulsion. These rules are published yearly in the student handbook and each year Coveney received a copy of the handbook. The undisputed facts in this case are that Coveney entered the dormitory room of female students without their permission and that he helped to bar the entry of female students, who were the rightful occupants of the room.[2]

[7] In light of these facts we conclude that Coveney's expulsion was neither arbitrary nor capricious. A college must have broad discretion in determining appropriate sanctions for violations of its policies. See *Woods v. Simpson*, *supra* 146 Md. at 551, 126 A. 882. Cf. *Frank v. Marquette Univ.*, *supra* 209 Wis. at 377–378, 245 N.W. 125. Moreover, the college provided Coveney with two hearings and with the opportunity to make statements. Regardless of whether any hearing was required, see *infra*, the fact that these proceedings occurred and were conducted fairly further indicates that the college's expulsion of Coveney was neither arbitrary nor capricious.

[8] The plaintiffs assert that because Bagley received a lesser punishment than that inflicted on Coveney, a material issue of fact exists as to whether there were sufficient facts to support the college's differentiation in punishment. We disagree. As a general rule, mere comparisons between punishments imposed on students are immaterial to the issue of whether a particular punishment imposed on a particular student is arbitrary or capricious. See *Frank v. Marquette Univ.*, *supra*; *Dehaan v. Brandeis Univ.*, 150 F.Supp. 626, 627 (D.Mass.1957) ("In dealing with students who have violated rules or who have been guilty of conduct requiring discipline, differences may exist requiring, or at least reasonably permitting, differences in treatment." *Frank v. Marquette Univ.*, *supra*). In this case, the undisputed facts indicate that the college's imposition of different punishments was not arbitrary or capricious. Bagley entered room 227 after Coveney and Debs, stayed for a lesser period of time, and unlike Coveney and Debs, did not bar the entry of the rightful occupants. We conclude that the college acted neither arbitrarily nor in bad faith in subjecting Coveney to a more stringent punishment than that imposed on Bagley.

[9] We also conclude that the granting of summary judgment against the plaintiffs

2. In affidavits, the two women who were rightful occupants of the room specify that they placed the intoxicated woman upon a bed in their room, that they left the room for a time, then returned to find the door of the room closed but unlocked, that they tried forcibly to open the door, but did not succeed because someone was pushing against the door from inside the room, that other students joined in the attempt, and ultimately the door was opened and Coveney and Debs ran from the area; and that they entered their room and found the intoxicated woman partially unclothed upon the bed.

Coveney's counter affidavit states: "I went into [the room] without seeking out the occupants since the door was unlocked. I question whether specific permission was needed in order to enter. I assisted in keeping the door to [the room] shut for a negligible period of time, but I deny I knowingly prevented the rightful occupants from entering the room."

At the deposition, Coveney admitted that he knew that females were attempting to enter the room. In the entire circumstances, it is fair to conclude that it is undisputed that Coveney entered the room without permission of the occupants, and helped bar the entry of the rightful occupants.

was appropriate because Coveney executed a valid and binding general release which recited a consideration and was under seal, and which waived all past, present or future claims against the college, arising out of any disciplinary action related to the night in question. See *Schuster v. Baskin*, 354 Mass. 137, 140–141, 236 N.E.2d 205 (1968); *Naukeag Inn, Inc. v. Rideout*, 351 Mass. 353, 356–357, 220 N.E.2d 916 (1966); *Lee v. Allied Sports Assocs.*, 349 Mass. 544, 549–551, 209 N.E.2d 329 (1965). In this case, Coveney executed the release in consideration for being granted a de novo hearing before the president of the college. The plaintiffs do not challenge the validity of the release on its face. Rather, they challenge the validity of the release on several other grounds: (1) that Coveney was already entitled to a hearing and, therefore, there was no consideration for the release, (2) that Coveney never received an adequate hearing and (3) that he signed the release under duress. We reject all these contentions. In doing so, we need not reach or rely on the college's persuasive arguments that, if Coveney was entitled to a hearing, he did receive one before the dean of students.

[10–12] It is clear that because the college is a private institution, Coveney had no constitutional right to a hearing. See *Flagg Bros. v. Brooks*, 436 U.S. 149, 156–157, 98 S.Ct. 1729, 1733–34, 56 L.Ed.2d 185 (1978); *Jansen v. Emory Univ.*, 440 F.Supp. 1060, 1062 (N.D.Ga.1977), aff'd, 579 F.2d 45 (5th Cir.1978). See also *Lorentzen v. Boston College*, 440 F.Supp. 464 (D.Mass.1977), aff'd, 577 F.2d 720 (1st Cir.1978), cert. denied, 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979). Furthermore, Coveney did not have a contractual right to a hearing based on a provision contained in the student handbook that was in effect when he matriculated in the college. The student handbook that was in effect at the time of the incident that led to Coveney's expulsion is clear that there was no right to a hearing before expulsion from the college. A college is "clearly entitled to modify [its rules and regulations] so as to properly exercise its educational responsibility." *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976).

[13, 14] The release also may not be voided on the ground that Coveney never received an adequate hearing or that he signed the release under duress. We reject the plaintiffs' suggestion that Coveney was entitled to have an attorney present at the hearing. Because the college is a private institution, Coveney had no constitutional right to have an attorney present. Cf. *Gabrilowitz v. Newman*, 582 F.2d 100, 104–107 (1st Cir.1978). In addition, the undisputed facts show that the presence of an attorney was not a condition of the release. Hence, the adequacy of the hearing before the president of the college may not be challenged on this ground. The hearing is also not invalid on the ground that the president was informed of the events prior to the hearing. See *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Assoc.*, 426 U.S. 482, 492–493, 96 S.Ct. 2308, 2314, 49 L.Ed.2d 1 (1976); *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 625–626 (10th Cir.), cert. denied, 423 U.S. 896, 96 S.Ct. 202, 46 L.Ed.2d 131 (1975). In addition, the president's failure to question the witnesses actively does not invalidate the hearing.

[15] Finally, the release may not be voided on the theory of duress. To avoid a contract on the basis of duress, a party must show that conduct by the other party caused him to enter into the contract "under the influence of such fear as precludes him from exercising free will and judgment." *Avallone v. Elizabeth Arden Sales Corp.*, 344 Mass. 556, 561, 183 N.E.2d 496 (1962). Coveney admits that he signed the release "freely and voluntarily." His statements show no more than that he was upset at the prospect of not graduating. Therefore, duress has not been shown.

We affirm the judgment of the Superior Court on the grounds that Coveney's dismissal did not violate his contractual or constitutional rights and was not arbitrary or capricious. We also conclude that the judgment may be affirmed properly on the basis of the general release which Coveney executed in consideration for the hearing before the president of the college.

Judgment affirmed.

APPLICANTS FOR GRADUATIO
May 20, 1989

MASTER OF DIVINITY

1. Wesley Steven Arledge
2. David Allen Atchison
3. Rudolph Graham Babcock
4. John Terry Barnes
5. Robert Eugene Barr
6. Timothy E. Binns
7. John Harold Bley**
8. Irvin Joseph Boudreaux**
9. William Ronald Branch
10. Leroy J. Brewer
11. Curtis Alan Bridges
12. W. Douglas Brinson
13. Darrell Roland Brown
14. Richard Timothy Brown
15. David George Burzynski
16. Brenda Benfield Caldwell**
17. Charles Edward Castles
18. C. LaDon Chancellor
19. Otis Hendrick Corbitt
20. William Gary Creech
21. John Clayton Crowe
22. Dwight E. Cummings
23. Jonathan McCord Daniels
24. David Franklin Daugherty**
25. Brian Earl Davis
26. Ron Dingus
27. L. Daniel Dix
28. Marvin Eugene Douglass
29. Lauralee Grace Stapp Estes**
30. ~~Larry L. Finke~~
31. Mark R. Foley
32. Craig Eugene Forque
33. Larry Ernest Gipson
34. John David Gordon
35. Jeffrey Claude Griffis**
36. William Michael Gwinn
37. Michael Dean Hagen
38. Billy Gene Hardin**
39. James Arnold Harrison
40. Dennis Wayne Hawkins**
41. David Allen Hayes
42. James Theodore Headlee
43. Charles Phillip Herring
44. Esmond Wentworth Hilton**
45. Hans Harward Hutchins**
46. Daniel Wesley Hyde**
47. Michael S. Indorf
48. Robert Daniel Johnson
49. Thomas Johnson Kaplan**
50. Russell Benjamin Keyes
51. Derek Mohan Kirpalani
52. Donald R. Kleeb**
53. David Earl Leavell
54. Dale W. Lee
55. Geraldine Joseph Lee
56. Gregory Lee Lopresto
57. Harold Kirk Lucky

MASTER OF DIVINITY

58. Gregory Joseph McBride
59. Will H. McRaney
60. Wayne David Moran
61. Harold Reese Mosley
62. Lonnie R. Nelson
63. Beverly Nesom**
64. Jeffery Anson Nichols
65. Roger David Perkins
66. Charles Ernest Pharis**
67. Lucius B. Pooser**
68. Joseph Mark Randolph
69. Gary Scott Rayburn
70. James Harold Reid
71. Stephen David Richardson
72. John T. Risher
73. Karl Wayne Roberts
74. Paul Roberts
75. Jodie Marie Robin
76. Joseph Ryan Rollins
77. Charles Jeffery Rutledge**
78. Donald Thomas Satterwhite
79. Donald Alan Seagle
80. James Edward Shafto
81. Jerry L. Smith
82. Joey Edward Smith
83. Philip Sanders Smith
84. Anthony Lee Snyder
85. Joseph Stewart Sorah
86. David Brandon Spiers
87. Mark D. Stagg
88. ~~Kennith C. Sterling~~
89. Patricia Corr Taylor
90. Tim Tolleson
91. Timothy Clark Tomlinson
92. Timothy C. VanLandingham
93. Voyles, Jeffrey Loyal**
94. Michael Gene Waldrip
95. Bart Matthew Walker
96. Gerald Herrin Walker
97. Ray Wilton Wall**
98. George H. Wells**
99. Willie Charles Williams
100. Teddy Glen Wilson
101. Murray Ross Wilton**
102. Michael Joseph Wright
103. James H Gibson

**These students anticipate completing degree requirements at the close of the summer session, July 28, 1989.

104 Diane R Cook

APPLICANTS FOR GRADUATION
May 20, 1989

MASTER OF CHURCH MUSIC

Robert Carl Bain
Edgar B. Gardner
Charles A. Little
Tammy Sue Little**
Kenneth Andrew Mann
Perry Alan Porter
David Thomas Taylor
Mike Lott
~~Robin Charles Gilchrist~~ will graduate in Dec
Gambrell, Mary
Lee, Tim S
Denton, Dav

ASSOCIATE OF DIVINITY IN CHURCH MUSIC MINISTRY

~~Deannette Elaine Harvard**~~ (not graduating)

**These students anticipate completing degree requirements at the close of the summer session, July 28, 1989.

May 20, 1989

MASTER OF RELIGIOUS EDUCATION

1. Jackie Kyle Banes
2. Jason Philip Bird
3. Paul Alan Broom
4. Elizabeth Watkins Cape
5. Mack Wayne Carney
6. David William Cleeland
7. James Mike Collins (already has cap, gown and hood, will purchase stole only)
8. Robert Franklin Courtney
9. Patricia Leah Cummings**
10. Johnnie Ray Dear
11. Larry Wayne Felkins
12. Paul Travis Flowers
13. Arnold Parks Gosnell**
14. Kenneth Charles Guy
15. Melody Bell Gwinn
16. John Douglas Herring**
17. James Jason Ingram
18. Robert Calvin Jones**
19. James Randall Lamon
20. Larry L. Langley
21. Angela Traylor Mann
22. Mark Benny McDaniel
23. Ernest L. Moran, Jr.
24. William K. Patterson
25. Robert Moore Payne
26. Regina Hazel Peele
27. James Barry Pounds**
28. James Leland Reid
29. Daniel O'Neal Richardson
30. Larry Rogers
31. William Jeffrey Rose
32. Henry Leon Schilling
33. Kennith G. Sterling
34. James Richard Stewart
35. Mark A. Ward
36. Melvin Joseph Yorks**
37. Gloria Lynne Youngblood

**These students anticipate completing degree requirements at the close of the summer session, July 28, 1989.

May 20, 1989

3-13.S.

ASSOCIATE OF DIVINITY IN PASTORAL MINISTRY

1. Cheryl Cook Ambielli
2. David Joseph Brunet
3. Paul W. Campbell
4. Phillip A. Connell, Sr.
5. Larry Ray Ellington
6. Israel Santiago Garcia
7. Regina Brooks Hickman
8. Timothy William Howard, Sr.
9. John Hutto
10. Eric Raymond Jefferds
11. Kathi Hiers Johnson
12. Si-Xin Peter Ling**
13. Tommy Wayne Miller
14. David Shardon Pate
15. Leon J. Placek
16. German Allan Rivas
17. Farren Boyd Roper**
18. Joseph C. Sauce, Jr.
19. William Arthur Shifflett
20. Tommy R. Smith
21. Stevie Davis Stewart
22. Donnie Edward White, Sr.
23. Garry Blain Zook**
24. SAM LOBELLO
25. Brigham L. Kline
26. Prudent Kadjo
27. Philippi, William
28. Fils-Aime, Anthony C.
29. Martinez, Pablo L.

ASSOCIATE OF DIVINITY IN RELIGIOUS EDUCATION

1. Ginger S. Adams
2. Silverio Domingo
3. Drell, Carol Cantrelle
4. John Lester Griner**
5. Rodney Reid Hord
6. Johnny Ray Moreno
7. Roland Steve Skates
8. Mrs. Helen Simmons

**These students anticipate completing degree requirements at the close of the summer session, July 28, 1989.

APPLICANTS FOR GRADUATION
May 20, 1989

DOCTOR OF MINISTRY

Harry Boyd, Jr.
Gerald Walker Haley
Donald Glen Payne
Howard Milton Peak
Roy David Raddin, Jr.

DOCTOR OF EDUCATION

Carol A. Evans
Mark F. Graham
Gregory James Walkup
Michael S. Young

DOCTOR OF THEOLOGY

Tommy Joe Bolan
Kathleen McGovern Gaffney
David Hugh Stutts
George Traman Washburn
Edgar Lee Wright

New O. eans Baptist Theolc ical Seminary

3939 Gentilly Boulevard • New Orleans, Louisiana 70126-4858 • (504) 282-4455

Public Relations

March 27, 1989

Dear Graduate:

Congratulations! The Office of Public Relations has been notified that you are a candidate for May graduation.

We wish to inform your family and friends that you have earned your degree from New Orleans Baptist Theological Seminary. In order that we may release this news to appropriate media, we ask that you **fill out the enclosed form and return it to the Office of Public Relations no later than Friday, April 21, 1989.**

Please do not overlook this important step in the graduation process. **If there is a problem in returning the news release form by April 21, please give us a call at 286-3603.**

If this office can be of any further assistance to you, now or in the future, please do not hesitate to call on us.

Sincerely,

Ellen Smith

Ellen Smith
Assistant Office Manager
Office of Public Relations

As you can see this ... was so ... personal ... all ... forms were sent ...

GRADUATION NEWS RELEASE INFORMATION

(Please print)

Return to Public Relations Office by Friday, April 21.

Name_____ **Graduation Date**_____

Current Address_____

Address After Graduation (If known and different)_____

_____

Hometown, State_____

Degree To Be Awarded_____

Spouse's Name (include wife's maiden name)_____

Spouse's Hometown_____

Your Parents' Names _____

Parents' Address_____

Your Home Church, City, State_____

Present Ministry Position (If applicable), **Church, City, State**_____

_____

Educational Background (college level degrees)

Degree:_____ School:_____

City:_____ State:_____ Year:_____

Degree:_____ School:_____

City:_____ State:_____ Year:_____

Degree:_____ School:_____

City:_____ State:_____ Year:_____

Newspapers to which news releases should be sent (include city):

Home state Baptist paper:_____

Hometown newspaper:_____

One other newspaper:_____

(If the reason for sending a release to a particular paper is not evident from above information, please state the connection below.)

New Orleans Baptist Theological Seminary

3939 Gentilly Boulevard • New Orleans Louisiana 70126-4858 • (504) 282-4455

Office of the
Executive Vice President

April 10, 1989

Mr. Rudolph G. Babcock
4592 Providence Place
New Orleans, LA 70126

Dear Rudy:

This letter is to give written expression to my approval of your request for continuance in seminary housing while taking only two hours of credit course work this fourth term. I understand from Dr. Minton's office that these are the only two hours that you need to complete your degree program. According to established precedent, I am approving your request. A copy of this letter is being sent to the housing office. It will apprise them of our agreement.

Let me remind you that this letter does not preclude your responsibility for following regular vacating procedures at the time of graduation. You must turn in your vacating notice thirty days prior to the time you move your trailer from the campus. You have two weeks beyond graduation as a time frame for effecting your transitional move.

Cordially yours,

Don H. Stewart
Executive Vice President

DHS:rkw

New Orleans Baptist Theological Seminary

3939 Gentilly Boulevard • New Orleans, Louisiana 70126-4858 • (504) 282-4455

April 22, 19[illegible]

Mr. Rudolph Babcock
4502 Providence Place
New Orleans, La. 7012[illegible]

Dear Mr. Babcock:

Let me take this opportunity to offer congratulations upon your planned graduation May 19, 1989. I trust that ministry will be a fruitful one as you move into new areas of service.

In order to avoid confusion and last minute rush, I need to remind you of the following policy for students in seminary housing. Students must vacate seminary housing within two weeks of graduation exercises. (Date: June 2, 1989). The seminary requires a 30-day vacating notice for current residents. Therefore, such notices should be on file in the Housing Office no later than May 2, 1989.

If you plan to remain in housing while pursuing additional studies, you must obtain approval to do so from Office of Student Affairs.

By May 2, 1989, we need to have either a vacating notice or an extension approval letter on file in the Housing Office.

If you have questions concerning this matter, please contact the Housing Office.

Sincerely,

Becky Brown

Becky Brown, Director
Housing and Student Services

BB/sm

New Orleans Baptist Theological Seminary

3939 Gentilly Boulevard • New Orleans, Louisiana 70126-4858 • (504) 282-4455

April 21, 1989

Dear Graduate:

We wish to commend you for your accomplishments during the time that you have been enrolled with us and would like to make a few suggestions to you in order that the graduation exercises on May 20, 1989, may be carried out as smoothly as possible.

Graduation has been planned for 10:00 a.m., Saturday, May 20, 1989, in the Roland Q. Leavell Chapel on the seminary campus. Please meet with the staff of the Registry Office at 2:30 p.m., Friday, May 19, 1989, in the Leavell Chapel for rehearsal. **Your presence at the rehearsal is imperative**.

You will need to notify me or Miss Kathryn Harper, Registry Office, Hardin Student Center, immediately if your plans for participation in the graduation ceremonies have been changed. Unless we hear from you to the contrary, we will count on you to be present for the rehearsal and graduation exercises.

Doctoral candidates should bring their doctoral hoods to the rehearsal where instructions will be given with reference to proper placement of the hoods for the graduation exercises. The Public Relations Office has requested that all doctoral candidates be prepared for individual pictures immediately following the rehearsal on Friday afternoon. **Coats and ties for the men are required for this photograph**. Group pictures of the doctoral candidates by respective home states will be taken in front of the Sellers Building at 9:30 a.m., Saturday, May 20, 1989.

All graduating seniors should have already completed and returned the Graduate News Release Information form mailed earlier. If you have not, please do so immediately.

Child care facilities will be available at the Preschool Education Center for children three years of age and under (this also includes children of our out-of-town guests). The Center will be open at 9:00 a.m., Saturday, May 20, 1989, for your convenience. It will be necessary for you to pick up your children not more than 15 minutes after the graduation exercises are over. PLEASE OBSERVE THAT YOU WILL NEED TO CONTACT MISS GRACE GRAHAM, DIRECTOR OF THE PRESCHOOL CENTER IF YOU PLAN TO USE THIS SERVICE ON GRADUATION DAY.

Thank you for your cooperation with us during the time you have been a student at the seminary. We are counting on your continued interest in our beloved School of Providence and Prayer.

Sincerely yours,

Bart C. Neal
Director of Admissions and Registrar

BCN/kh

9939 Gentilly Boulevard
New Orleans, Louisiana 70126

Mr. Rudolph Graham Babcock
4592 Providence Place
New Orleans, La 70126

Commencement Calendar

New Orleans Baptist Theological Seminary

May 19 - 21, 1989

Reception for Graduates

Friday, May 19 — President and Mrs. Leavell

7:00 - 8:30 p.m. — 4111 Seminary Place

Breakfast for Graduates

Saturday, May 20 — President and Mrs. Leavell

7:30 a.m. — Seminary Dining Room

Commencement Exercises

Saturday, May 20 — Awarding of Degrees

11:00 a.m. — Roland Q. Leavell Chapel

Commencement Exercises

Saturday morning, May twentieth

Nineteen hundred and eighty-nine

at ten o'clock

Roland Q. Leavell Chapel

Landrum Pinson Leavell II

President

New Orleans Baptist Theological Seminary

New Orleans Baptist Theological Seminary
cordially invite you to a reception
honoring the members of the graduating class
and their families
Friday, May nineteenth
Nineteen hundred and eighty-nine
seven until eight-thirty in the evening
4111 Seminary Place

President and Mrs. Landrum P. Leavell II
cordially invite you
to attend a breakfast for
the members of the graduating class
Saturday, May twentieth
Nineteen hundred and eighty-nine
at half past seven in the morning
Dining Room
New Orleans Baptist Theological Seminary
R.S.V.P. on enclosed card by May eighth

The Faculty and Graduating Class
of the
New Orleans Baptist Theological Seminary
announce the
Commencement Exercises

Foreign MissionBoard
of the Southern Baptist Convention
PO Box 6767 • 3806 Monument Avenue, Richmond, Virginia 23230

Mr. Rudolph G. Babcock
4592 Providence Place
New Orleans, LA 70126

Foreign Mission Board
of the Southern Baptist Convention
P.O. Box 6767 • Richmond, Virginia 23230-0767 • (804) 353-0151

FMB 2500 3/89 P10^5

Congratulations. . .

on your graduation!

We at the Foreign Mission Board extend to you our warmest wishes as you begin a new chapter in your service to God. We encourage you to keep foreign missions an integral part of your Christian ministry. Please call on us as you need foreign missions resources.

Tom Warrington

LAW OFFICES
A. MORGAN BRIAN, JR.
A PROFESSIONAL LAW CORPORATION
700 CAMP STREET
EW ORLEANS, LOUISIANA 70130

5/9
3:23
gp

Ellis B. Murov, Esq.
Deutsch, Kerrigan & Stiles
755 Magazine Street
New Orleans, LA 70130

BY HAND

LAW OFFICES
A. MORGAN BRIAN, JR.
A PROFESSIONAL LAW CORPORATION
700 CAMP STREET
NEW ORLEANS, LOUISIANA 70130
(504) 528-9500

May 9, 1989

BY HAND

Ellis B. Murov, Esq.
Deutsch, Kerrigan & Stiles
755 Magazine Street
New Orleans, Louisiana 70130

Re: Babcock - NOBTS
Your file: 03325-01
Our ref: 477-001

Dear Ellis:

This is to advise you that New Orleans Baptist Theological Seminary will not grant to Mr. Babcock a degree at the commencement scheduled for May 20.

Sincerely,

AMB:ijf

cc: Mr. Rudolph G. Babcock - BY HAND
James P. Guenther, Esq.
Richard T. Simmons, Esq.
Dr. Don H. Stewart
Dr. Landrum P. Leavell, II
Dr. Bart C. Neal

DEUTSCH, KERRIGAN & STILES
(A PARTNERSHIP INCLUDING PROFESSIONAL LAW CORPORATIONS)

755 MAGAZINE STREET
NEW ORLEANS 70130-3672
TELEPHONE (504) 581-5141
CABLE ADDRESS "DEKEST"
TELEX 584358
TELECOPY 504/566-1201

ELLIS B MUROV

ST TAMMANY OFFICE
85 WHISPERWOOD BOULEVARD
SLIDELL, LA 70458-1199
TELEPHONE (504) 64-1070
MAILING ADDRESS
P O BOX 220
SLIDELL, LA 70459-0220

May 10, 1989

BY HAND

A. Morgan Brian, Jr.
700 Camp Street
New Orleans, Louisiana 70130

Re: Rudolph G. Babcock v. New Orleans
Baptist Theological Seminary
Our File: 03325-001
Your File: 477-001

Dear Morgan:

We are in receipt of your letter dated May 9, 1989 which states that New Orleans Baptist Theological Seminary will not grant Rudy Babcock his degree. Confirming our discussion of May 9, the action was taken because Babcock would not have earned his degree if he had been expelled in August of 1988 and the degree will be withheld if the Fourth Circuit reverses.

Babcock does not accept the validity of the above and is entitled to graduate as he has earned his degree.

Very truly yours,

Ellis B. Murov

EBM/11

STATE OF LOUISIANA

COURT OF APPEAL

FOURTH CIRCUIT

NO. 89-CA-1248

RUDOLPH G. BABCOCK
Plaintiff-Appellee

versus

NEW ORLEANS BAPTIST THEOLOGICAL SEMINARY
Defendant-Appellant

Appeal of Civil Proceeding
from the Civil District Court
for the Parish of Orleans
Hon. Robert A. Katz, Judge

ORIGINAL BRIEF OF APPELLEE

ELLIS B. MUROV, #9839
JOANNE C. FERRIOT, #18209
DEUTSCH, KERRIGAN & STILES
755 Magazine Street
New Orleans, Louisiana 70130
(504) 581-5141
Counsel for Rudolph G. Babcock

EXHIBIT
A-4

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SYLLABUS

1. A consent judgment on the merits has the authority of a thing adjudged and may not be re-litigated. Cheramie v. Vegas, 468 So. 2d 810 (La. App. 1st Cir. 1985), writ denied, 470 So. 2d 122 (La. 1985) and Greenwood v. New Orleans, 12 La. Ann. 426 (La. 1857). See also La. Civ. Code Art. 3078; Kelly v. Homer Compress Company, 110 La. 983, 35 So. 256 (1903); Salling Wiping Cloth Company, Inc. v. Sewell, Inc., 419 So. 2d 112, 117 (La. App. 2d Cir. 1982); Thompson v. Bank of New Orleans & Trust Company, 422 So. 2d 230 (La. App. 4th Cir. 1982); and Edder Forest Products v. B & F Lumber & Supply, 458 So. 2d 644 (La. App. 3d Cir. 1984).

2. A private school may not dismiss its students arbitrarily or capriciously. Slaughter v. Brigham Young University, 514 F.2d 622 (10th Cir. 1975), cert. denied 423 U. S. 898 (1975); Lexington Theological Seminary v. Vance, 596 S.W. 2d 11 (Ky. App. 1979); Tedeschi v. Wagner College, 427 N.Y. Supp. 2d 760 (N.Y. App. 1980); and Fussell v. Louisiana Business College of Monroe, Inc., 478 So. 2d 652 (La. App. 2d Cir. 1985).

3. A school's expulsion of a student on non-academic grounds is reviewable by the courts. Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed. 2d 725 (1975); Tedeschi v. Wagner College, 404 N.E. 2d 1302 (N.Y. 1980); and Fussell v. Louisiana Business College of Monroe, 478 So. 2d 652 (La. App. 2d Cir. 1985).

4. When a student has completed all requirements for the degree, a school must award the degree. DeMarco v. University of Health Sciences/Chicago Medical School, 352 N.E. 2d 356 (Ill. App. 1976); and Blank v. Board of Higher Education, 276 N.Y. Supp. 2d 796 (N.Y. 1966). See also Shuffer v. Board of Trustees, 136 Cal. Rptr. 537 (Cal. App. 1977) and Tanner v. Board of Trustees, 363 N.E. 2d 208 (Ill. App. 1977).

5. An issue may not be raised for the first time on appeal. Krauss v. Develle, 236 La. 1072, 110 So. 2d 104 (1959); Mundy v. Gentilly Oaks, Inc., 227 La. 118, 78 So. 2d 530 (1955); and Handy v. Cheatum, 410 So. 2d 322 (La. App. 4th Cir.1982).

6. Characterizations are not dispositive. Commissioner v. Culbertson, 337 U.S. 733 (1949); Nash v. Currette, 215

La. 109, 39 So. 2d 840 (1949); and Due v. Due, 342 So. 2d 161 (La. 1977).

ISSUES TO BE RESOLVED BY THIS COURT

1. Does the First Amendment deprive the civil courts of the State of Louisiana of jurisdiction herein?

2. Is NOBTS barred by the doctrine of res judicata from pleading or claiming that Babcock is unfit to graduate?

3. That is, can NOBTS, which has agreed through a now final consent judgment granting an injunction not to expel Babcock for certain alleged conduct, now cite the same conduct as the basis for denial of his degree?

4. Assuming arguendo that the consent injunction and the doctrine of res judicata do not bar this Court from considering any issue except the jurisdictional one, then may courts review an arbitrary withholding of a degree?

5. Assuming arguendo that the consent injunction and the doctrine of res judicata do not dispose of the existence of non-arbitrary or capricious reasons for withholding Babcock's degree, then is the withholding of a degree arbitrary where NOBTS has not pointed to any post August 18, 1987 conduct as the basis for its decision?

6. Are characterizations dispositive?

7. Is NOBTS' characterization of Babcock as unfit an effort to circumvent the fact that its attempted discipline of Babcock for having separated or divorced has been held to be unfounded, unwarranted and illegal?

8. Is NOBTS entitled to attorney fees?

9. Is Babcock entitled to attorneys fees?

CONCISE STATEMENT OF FACTS

Babcock incorporates by reference the Concise Statement of Facts presented at pages 3-9 of his Brief in No. 89-0233. In addition, the following statements of fact are pertinent.

1. Rudolph G. Babcock is an individual of the full age of majority residing and domiciled in Orleans Parish with his wife, Suzanne Babcock at all material times herein.

2. Defendant, New Orleans Baptist Theological Seminary ("School" or "NOBTS"), is an educational institution located in Orleans Parish.

3. Rudolph Babcock was a duly matriculated student at the School at all material times herein.

4. In August, 1985, Babcock entered the School to pursue a Master of Divinity degree in marriage and family counseling.

5. On August 4, 1987, Babcock received a letter from the School's executive vice president expelling him for having allegedly separated from his wife and for considering divorce.

6. Petitioner had not separated from his wife and he was not considering divorce. Babcock, moreover, was expelled without a hearing, in total disregard for the procedures

printed in the student handbook as "due process" for student disciplinary matters.

7. As a result, on August 19, 1987, Babcock filed suit for specific performance and injunctive relief. See No. 87-15087. (Exhibit 1).[1/]

8. A temporary restraining order was granted by Judge Yada McGee prohibiting the School from dismissing Babcock and from interfering with his career goals and studies.

9. When the cause was to be heard for the issuance of a permanent injunction, the School interposed an exception of lack of jurisdiction, claiming state interference in church matters.

10. On December 21, 1987, the hearing on the exception was held.

11. On March 18, 1988, the exception was dismissed. (Exhibit 2).

12. On May 31, 1988, the parties agreed to a consent "final judgment," whereby the School, reserving its right to appeal the jurisdictional issue, agreed to a permanent injunction prohibiting Babcock's dismissal "based upon any of his conduct or activities occurring on or before August 19, 1987 . . . ." and reinstated his scholarship. (Exhibit 3).

1/ Unless otherwise indicated, exhibit references are to exhibits attached to Babcock's Petition for Temporary Restraining Order, Injunctive Relief and Specific Performance filed on May 12, 1989.

13. The School appealed only the denial of the Exception devolutively. (Exhibit 4).

14. Babcock continued his studies, completed all requirements, and received letters, notices and verifications of the imminency of his graduation from the public relations office, the executive vice president, the director of housing, the registrar, the president, and the Southern Baptist Foreign Mission Board. (Exhibit 5 in globo).

15. On May 9, 1989, the day before Babcock's Brief was due in the first case of this consolidated appeal, counsel for Babcock received a two-line letter notifying counsel that the School refuses to award Babcock's degree at commencement, May 20, 1989 because if he had been expelled in August of 1987, he would not have earned his degree, and be on the May 20, 1989 graduation list. (Exhibits 6 and 7). See also Affidavit of Joe Cothen at paragraph 5.

16. Upon Babcock's request for injunctive relief presented filed on May 12, 1989, Judge Robin Giarruso granted a temporary restraining order requiring the School to award Babcock his degree.

17. On May 17, 1989, Judge Katz granted a preliminary injunction requiring the School to award the degree during the May 20 graduation ceremonies, and denying NOBTS' Motion to Dissolve the Temporary Restraining Order.

18. NOBTS took an emergency supervisory writ to this court, which agreed to stay the preliminary injunction as to the award of the degree to Babcock, but required that Babcock be allowed to participate fully in the graduation ceremonies on May 20, 1989.

ARGUMENT

A. The Louisiana Civil Courts Have The Jurisdictional Power to Entertain Babcock's Petition.

Babcock incorporates by reference his statements, arguments and authorities presented in his Brief in No. 89-0233. Babcock additionally submits the following:

Appellee cannot comprehend why NOBTS insists on citing E.E.O.C. v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981), when it is an employment case and this isn't and when its holding, assuming applicability, supports Babcock herein. The only issue upon which defendant therein prevailed was the statutory one and then only for purposes of the faculty. As to students such as Babcock, defendant therein lost on both statutory and constitutional grounds.[2/]

B. Introduction To The Second Case Of This Consolidated Appeal

1. The reasons for this case and this appeal per NOBTS

2/ As set forth in the original Brief, the action involved Title VII of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, sex, color, national origin and religion. Thus, assuming arguendo that the EEOC had sought to enforce a subpoena on a race, sex or national origin charge, the defendant would have lost on all grounds as the only reason it prevailed on the statutory ground for faculty was a specific and narrow exemption in the statute. See 42 U.S.C. § 2000 e-1.

According to NOBTS, it withheld Babcock's degree for two reasons. First, the School was "concerned that its pending First Appeal would become moot if he graduated." Appellant Brief at p. 4. Second, the School "still regard[ed] him as ministerially unfit." Appellant Brief at p. 4.

2. Metamorphosis via characterization

In August 1987, NOBTS attempted to expel Babcock based upon provisions in its disciplinary code against separation and divorce. Because Babcock was neither separated nor divorced, he challenged his expulsion and prevailed. That is, based upon a motion to enter consent judgment, Judge Katz enjoined NOBTS from expelling Babcock for conduct occurring on or before August 18, 1987. NOBTS chose not to appeal this judgment other than on jurisdictional grounds.

On appeal and in its Brief in No. 89-0233, NOBTS characterized its decision to expel as an academic one and also as one based upon moral unfitness. Why? Simple. NOBTS had no evidence whatsoever of a separation or divorce and had even conceded its attempted discipline was unfounded, unwarranted and illegal by entering into a consent judgment which it did not appeal except on jurisdictional grounds.

In its Brief herein, NOBTS has now recharacterized Babcock's August 1987 conduct as "marital irregularities."[3/] See Appellant Brief at p.14. Then, despite conceding that Babcock "satisfactorily finished all the courses required for the M-Div. degree "(Appellant Brief at p. 4), NOBTS withheld the degree for reasons set forth in subparagraph 1 above.

3. Characterizations are not dispositive.

Characterizations are not dispositive. Commissioner v. Culbertson, 337 U.S. 733 (1949); Nash v. Currette, 215 La. 109, 39 So. 2d 840 (1949); and Due v. Due, 342 So. 2d 161 (La. 1977).

NOBTS has cited no evidence of any conduct on Babcock's part in this consolidated appeal other than conduct occurring prior to August 18, 1987.

The School first characterized it as a disciplinary violation of separation or divorce. It then called it an academic deficiency even though it concedes now that Babcock "satisfactorily finished all the courses required for the M-

---

3/ In an Affidavit filed below, Dr. Cothen now accuses Babcock of "continued physical and verbal abuse of his wife, and a recurrence of other marital and family life difficulties and disturbances. " NOBTS has no shame. First, it proposes and enters into a consent judgment absolving Babcock of any conduct worthy of expulsion on or before August 18, 1987 and thereby precludes Babcock from litigating the merits. Then, even though the School cites to no post August 18, 1987 conduct on which to withhold a degree, it, nevertheless, accuses Babcock of the above occurring on or before August 4, 1987 and claims that is why his degree was withheld.

Div. degree." Appellant Brief at p. 4.[4/]

Next, the School called it evidence of moral unfitness and now characterizes as a marital irregularity and evidence of unfitness.[5/]

Characterizations, however, are not dispositive. Id. Babcock submits that the dispositive facts herein are NOBTS' chameleon behavior, the final consent judgment and the absence of any post August 18, 1987 conduct on which to base a decision to withhold Babcock's earned degree.

C. NOBTS Is Prohibited By The Doctrine Of Res Judicata From Putting At Issue Again The Merits Of Babcock's Attempted Dismissal.

Res judicata occurs when there is a judgment and one of the parties seeks to further litigate a matter involving "the same cause and the same object of demand as the prior suit." E.g., Rivette v. Moreau, 336 So. 2d 864, 866 (La. 1976). See also Cheramie v. Vegas, 468 So. 2d 810 (La. App.

4/ Unless NOBTS somehow has earned the right to twist the clear meanings of words into ungodly shapes, the word "academic" cannot possibly pertain to Babcock's marital relations. See Appellee's Brief, First Appeal, at 17-19, for discussion and authority concerning "academic" decisions.

5/ This change was necessary in order for the offense to fit within the catchall statement in the NOBTS Bulletin allowing NOBTS to deny a degree to anyone for any reason at any time. "Moral unfitness" would not seem to include divorce, however, if one is to believe NOBTS' Bulletin on the issue. See Appellee's Brief, First Appeal, at 25-26.

1st Cir. 1985), writ denied, 470 So. 2d 122 (La. 1985) (consent judgment has res judicata effect)[6/] and Greenwood v. City of N.O., 12 La. Ann. 426, 431 (1857) (consent judgment has res judicata effect).

Here, the parties are the same and the object (injunctive relief) is the same. Moreover, the cause is the same. That is, Babcock is seeking to compel the School to honor its contract and the dispute arises out of the significance and meaning of pre-August 18, 1987 conduct.

Thus, whatever NOBTS' characterization of Babcock's quarrel in 1987 -- whether "divorce," "academic" problems, or "moral unfitness" -- the fact remains that:

1. Babcock was never accused of any academic or disciplinary transgressions after August 19, 1987;
2. The refusal to award the degree is admittedly based on Babcock's alleged pre-August 19 transgressions; and

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6/ Even if one views the consent judgment below as a compromise, and one could because it spared NOBTS the expense of litigation on the merits, the result is no different. Compromises have a res judicata effect. E.g., Cheramie v. Vegas, supra. See also La. Civ. Code Art. 3078; Kelly v. Homer Compress Company, 110 La. 983, 35 So. 256 (1903); Thompson v. Bank of New Orleans & Trust Company, 422 So. 2d 230 (La. App. 4th Cir. 1982); Salling Wiping Cloth Company, Inc. v. Sewell, Inc., 419 So. 2d 112, 117 (La. App. 2d Cir. 1982), and Elder Forest Products v. B. & F. Lumber & Supply, 458 So. 2d 644, 645 (La. App. 3d Cir. 1984).

3. The final judgment of May 31, 1988, effectively erased from Babcock's legal balance sheet anything that had occurred prior to August 19, 1987.

D. Assuming Arguendo That The Doctrine of Res Judicata Does Not Dispose Of Babcock's Entitlement To His Degree, Then the Refusal To Award It was Arbitrary.

1. NOBTS concedes that courts may compel the award of degrees which were arbitrarily withheld.

Appellant concedes only that an academic decision to withhold a degree can be set aside by a court upon a showing of arbitrariness, capriciousness or unreasonableness. Appellant Brief at p. 15. This is a curious concession given NOBTS' earlier admission that Babcock "satisfactorily finished all the courses required for the M. Div. degree." Appellant Brief at p.4.

Curiosity aside, the admission is significant. It demonstrates that the decision to withhold the degree was not based upon academics.

In fact, as NOBTS concedes, the decision to withhold Babcock's degree was based on the decision to avoid mooting the jurisdictional issue, which has absolutely nothing to do with the merits of either of the consolidated cases, and recalcitrance or defiance. That is, the School submits that, if Babcock had been expelled in August 1987, he would not have

been on the graduation list in May 1989 and neither rain, nor sleet, nor snow, nor a consent judgment will prevent it from effectuating an expulsion.

2. **NOBTS' refusal to award Babcock his degree was arbitrary, capricious and unreasonable.**

A school's expulsion of a student on non-academic grounds is reviewable. Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed. 2d 725 (1975); Tedeschi v. Wagner College, 404 N.E. 2d 1302 (N.Y. 1980); and Fussell v. Louisiana Business College of Monroe, 478 So. 2d 652 (La. App. 2d Cir. 1985).

The quintessence of arbitrariness is a baseless decision.

Whether an alleged act of the "faculty"[7/] is cloaked in terms of "moral unfitness" or "academics" or "divorce" is insignificant now. The consent judgment erased any and all grounds for action arising out of pre-August 18, 1987 conduct. The decision to withhold the earned degree, therefore, can only be viewed as arbitrary and unreasonable as there is no basis or reason in support of same.

7/ There is considerable doubt as to whether the faculty ever met to discuss Babcock's case and vote upon awarding him his degree. Babcock Supplemental Affidavit, No. 5, May 16, 1989.

E. **NOBTS Cannot Assert The Lack of Exhaustion of Administrative Remedies For the First Time On Appeal**

Appellant's Brief at 14 posits the claim that Babcock should be deprived of his degree because he did not pursue some internal appeal mechanism.

Once again, NOBTS has impermissibly raised a claim for the first time on appeal, which it cannot do. See Appellee's Brief, First Appeal, at 17-18, n. 9. for discussion of and authority for the principle.

Moreover, and rather inconsistently, this is precisely the opposite stance taken by NOBTS in its Brief, First Appeal, at 28-30, wherein it maintains that Babcock's fate, fully appealed internally, was decided by the highest authority -- the Student Affairs Committee.

Finally, and assuming arguendo that the above isn't dispositive, one is never required to engage in a futile act. After all, Dr. Leavell could have just as easily awarded a degree as file an Affidavit if an appeal to him could alone have resulted in Babcock's receipt of his earned degree.

F. **Babcock Is Entitled To His Degree As He Earned It.**

Once a student has completed all requirements for the degree,[8/] satisfied his financial obligations, and has not

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8/ A student's relationship with its school, and vice-versa, is basically contractual. The contract consists (continued...)

breached the terms of his contract, the school must award the degree. DeMarco v. University of Health Sciences/Chicago Medical School, 352 N.E. 2d 356 (Ill. App. 1976); Blank v. Board of Higher Education, 273 N.Y. Supp. 2d 796 (N.Y. 1966). See also Shuffer v. Board of Trustees, 136 Cal. Rptr. 527 (Cal. App. 1977); and Tanner v. Board of Trustees, 363 N.E. 2d 208 (Ill. App. 1977) for the proposition that suits to compel award of degrees state a claim.

NOBTS can no more breach its contract with Babcock impunitively than any other school can violate its agreements with its students. To believe otherwise is a misrepresentation and distortion of the academic process. See also Affidavit of Sister Rosemarie Kleinhaus, May 16, 1989.

Babcock has earned his degree. This Court, accordingly, should affirm the decision below in order to effectuate an award of same.

8/ (...continued)
of an agreement on the student's part to pay tuition, to complete the required course work, and to abide by the rules; in exchange, the school agrees to provide courses and a degree. The contract is normally stated in a combination of the school catalogue, the student handbook, and perhaps other written agreements. Fussell v. Louisiana Business College of Monroe, 478 So. 2d 652 (La. App. 2d Cir. 1985); Tedeschi v. Wagner College, 404 N.E. 2d 1302 (N.Y. 1980); Lexington Theological Seminary v. Vance, 596 S.W. 2d 11 (Ky. App. 1979); Napolitano v. Trustees of Princeton University, 453 A.2d 279 (N.J. 1982).

G. NOBTS Is Not Entitled To Attorney Fees But Babcock is.

NOBTS asserts that it is entitled to attorney fees based upon the wrongful obtaining of a TRO/preliminary injunction. Babcock, of course, would not have had to file a second Petition if NOBTS had not wanted to prevent mootness which would not have harmed it, and had not breached the consent injunction which it in large part drafted and in its entirety executed.

Moreover, the only reason Babcock, and for that matter, NOBTS, has had to expend attorneys fees herein arises out of an effort to circumvent an injunction. After all, what else can one label NOBTS' interpretation[9/] of the consent judgment.

Whether one ultimately labels NOBTS' conduct as contemptuous vexatious or bad faith, attorneys fees are authorized. See La. Code Civ. Pro Art. 863.

9/ The School's apparent interpretation is that a promise supported by an injunction not to expel does not require award of a degree even though there is no post August 18, 1987 conduct on which the refusal is based.

CONCLUSION

Quare: Why would graduation have mooted the First Appeal? Could it be that the natural consequence of nonexpulsion and satisfactory completion of academic studies results in the award of a degree? If yes, then the School disrupted the nature of the educational process and violated a consent injunction which it drafted to boot.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Appellee's Brief has been served upon:

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by hand or by placing copies of same in U. S. Mail, postage prepaid and properly addressed this 23 day of August, 1989.

Ellis B. Murov
ELLIS B. MUROV

Supreme Court of the United States

No. 89-1997

New Orleans Baptist Theological Seminary,

Petitioner

v.

Rudolph C. Babcock

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeal of Louisiana, Fourth Circuit, No. 89-CA-0233; 89-CA-1248.

ON CONSIDERATION of the petition for a writ of certiorari herein to the Court of Appeal of Louisiana, Fourth Circuit.

IT IS ORDERED by this Court that the said petition be, and the same is hereby, denied.

October 1, 1990

Justice Blackmun would grant certiorari.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NEW ORLEANS BAPTIST THEOLOGICAL SEMINARY, Petitioner,	)	
vs.	)	No. 89-1997
RUDOLPH G. BABCOCK Respondent.	)	

Certificate of Service

I, J. Brent Walker, hereby certify that on July 20, 1990, I mailed first class postage paid 3 copies of the Motion for Leave to File Brief Amici Curiae and the Brief Amici Curiae of the Baptist Joint Committee on Public Affairs, Christian Legal Society, and National Council of Churches of Christ in the U.S.A. in support of Petition for Writ of Certiorari to each of the following Attorneys of Record in this case:

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89-1997

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

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New Orleans Baptist Theological Seminary, Petitioner
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Rudolph G. Babcock

Petition for Writ of Certiorari to the
Court of Appeal of Louisiana, Fourth Circuit

CERTIFICATE OF SERVICE

I, JAMES P. GUENTHER, a member of the bar of the Supreme Court of the United States, Counsel of Record for New Orleans Baptist Theological Seminary, Petitioner, hereby certify that on June 22, 1990, pursuant to Rule 29, I served three copies of the foregoing petition for writ of certiorari and appendix thereto by depositing in a United States post office with first class postage prepaid and properly addressed to Ellis B. Murov, Deutsch, Kerrigan & Stiles, 755 Magazine Street, New Orleans, Louisiana 70130, (504) 581-5141, counsel for the only party required to be served, the respondent, Rudolph G. Babcock. Dated June 22, 1990.

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